Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: THOMAS A. DIONISIO,
Debtor

THOMAS A. DIONISIO,
Petitioner,

v.

U.S. TRUSTEE'S OFFICE; VISION PROPERTIES OF FAIRLAWN I, LLC; JAMES A SCARPONE, CHAPTER 11 TRUSTEE; VICTOR FISCHETTI,
Respondents.

On Appeal From The United States Court of Appeals
For The Third Circuit
(3rd Circuit No.: 02-3020)

Circuit Court Judges: Alito, Fuentes and Greenberg

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Debtor in a Chapter 11 and/or 7 as a "Party in interest" have standing to participate/defend a motion filed by a commercial landlord to forfeit a lease under Section 365(d)(1), including the right to appeal?

2. Does Debtor have such right to defend and participate in the unusual situation of an emergent, summary proceeding to forfeit Debtor's lease filed by a landlord, seasonably after the appointment of a Chapter 11 Trustee, where the Debtor defended the motion, and the Trustee in writing and on the record represented he would affirm the lease if Debtor prevailed in the defense of the motion and prevented the forfeiture?

3. Whether the Trustee was able or could defend the motion where his failure to pay rent caused the filing of the forfeiture proceedings by the landlord?

4. Whether the sua sponte determination to deny Debtor standing on the appeals at the Circuit Court level after proceedings in the Bankruptcy Court and District Court where the issue was not even raised below, prejudiced Debtor and the estate, and precluded the Trustee from prosecution of the issues?

5. Should the Bankruptcy Court have allowed discovery and held a Fact Hearing on the issues below, rather than precipitously and summarily forfeit a bankruptcy estate asset?

6. Did the Honorable Bankruptcy Judge deny the Debtor and the Estate due process of law?

7. Does Section 365 (d) (4) of the Bankruptcy Code state an immutable, Draconian 60 day rule, or in unusual circumstances, can the rule be equitably relaxed to implement the legislative intent of the Code?

8. Do concepts of waiver and estoppel apply under Section 365 (d) (4) to prevent unequitable forfeitures?

9. Did Landlord waive, or is it estopped from the forfeiture relief given it summarily below?

10. Does the Chapter 7 Trustee have a second "60 days" to assume or reject a lease under Section 365(d)(1), or as the Legislative History states, the 60 days "recommences"?

11. Was the "Draconian" "harsh" forfeiture below inconsistent with the Legislative Intent of the Bankruptcy Code for reorganization of debtor assets, and equality in distribution to creditors?

12. Was the Third Circuit's own Channel Home Centers case and other authority, misapplied and misconstrued below?

LIST OF ALL PARTIES TO THE PROCEEDING

As listed in the caption of the case.

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11 U.S.C. Section 348 (c) 7

Section 70 (b) Act

TREATISE AND OTHER AUTHORITY

2 L. King, Collier on Bankruptcy Section 365.03 (15th Ed, 1988) 12

3 Collier on Bankruptcy (15th Ed.) Section 365.03 (1)(A) 12,17

Colllier on Bankruptcy, Section 1109.01 (1) & (4) 20

Webster's Third New International Dictionary 6

2 Collier on Bankruptcy Section 105.02 (I)(c) 16

JURISDICTION

Challenging a decision of the United States Bankruptcy Judge as reviewed by the United States District Judge under provisions of the Bankruptcy Code; Jurisdiction in the Third Circuit Court under 28 U.S.C. Section 1291 et seq. and Appellate Rule 6; and Petition for a Writ of Certiorari under Supreme Court Rule 10 for a review of a judgment of the United States Court of Appeals dated April 17, 2003 and attached

Opinion of even date. Issues below involved inter alia, 11 U.S.C.A. Section 365 (d) (1) and (4) ; the U.S. Constitution's due process section.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

(1) U.S. Constitution.

(a) 5th Amendment

> "No person shall. . .be deprived of life, liberty, or property, without due process of law. . . "

TABLE OF AUTHORITIES

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In re THW Enterprises, Inc., 89 B.R. 351 (Bkptcy S.D. NY 1985) 11,13,14,15,18

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FEDERAL STATUTES

11 U.S.C. Section 365(d)(1) 17

11 U.S.C. Section 365 (d) (4) 2,4,6,7, 8,10,11

(2) Bankruptcy Statute.

(a) 11 U.S.C.A. Section 365 (d) (4)

"if the trustee does not assume or reject an unexpired lease of non-residential real property under which the the debtor is the lessee within 60 days after the date of the order for relief. . .then such lease is deemed rejected".

(b)11 U.S.C.A. Section (d) (1)

"In a case under Chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief. . . then such contract or lease is deemed rejected".

(c) 11 U.S.C.A. 348 (c)

"Sections 342 and 365 (d) of this title apply in a case that has been converted under Section 706, 1112, 1208 or 1307 of this title, as if the conversion order were the order for relief".

(d) 11 U.S.C.A. Section 1109(b).

"A party in interest, including the debtor. . .may raise and may appear and be heard on any issue in a case under this chapter".

STATEMENT OF THE CASE

Debtor/Petitioner filed an emergent Chapter 11 Petition on November 22, 2000, virtually a day before the Scheduled Sheriff's sale of his horse farm. Debtor was gravely ill with long term illnesses and filed his bankruptcy Schedules with the information provided by his part-time business bookkeeper on December 18, 2000. Shortly before the bankruptcy, Debtors wife (who had handled his records and accounts), unexpectedly and precipitously abandoned the marital dwelling assisted by her male "companion" (Respondent Fischetti), and emptied the home of its contents including Debtor's personal and business books, records, papers, correspondence. It was later determined that Debtor's wife, was turning Debtor over in an I.R.S investigation to leverage the conversion of Debtor's assets in their divorce. Debtor <u>died</u> several times in this short time period, having been resuscitated in each instance.

Debtor filed well within the 60 days of the filing of his Petition, an Adversary Complaint in the Bankruptcy Court (# 01- 3031) to principally (Count One) obtain the turnover of his books and records so that Debtor could properly administer his Chapter 11 Proceedings and provide a legal basis for the activities of his Court-Appointed professionals. Debtor owned the majority of the stock in a large salon business. That jural business, independent of the Debtor-owned assets, was subject to obligations, leases and the like, and the morass and intertwined nature of this "interplay" was <u>unknown</u> to Debtor's "helpers" in the filing, and the legalities of this interplay lost on a "dying" Debtor. Only a review of Debtor's DOCUMENTS could determine the nature of

his assets and liabilities. It is interesting to note, that even at this late date, there has been no turn-over order for the records entered by the Bankruptcy Court.

Since the "lease" in question was not then known to be that of Debtor (as compared to several complex corporations and jural entities he has substantial interests in), same was referenced as to Debtor in the Schedules for disclosure purposes, but not listed as a "Debtor" lease in the Executory contracts schedule. Nor was the landlord Respondent Vision Properties listed as a creditor, because it was thought to be (to the bookkeeper) a creditor of the jural salon business, not of the Debtor, personally.

After the 60 days, the Landlord filed a motion to vacate the premises under Section 365(d)(4) under circumstances referenced hereafter as the subject of equitable relief, such as waiver and estoppel. The Bankruptcy Court on various dates, summarily, and on short-notice determined the issues, without trial, discovery, or the opportunity for Debtor to properly flesh out the underlying facts, which only came in strategic, voluntary doses. In fact, the "documents" that defined Debtor's rights vis-a-vis Respondent Vision Properties, was dropped on Counsel table in front of Debtor's Counsel at a hearing date on the record and while Counsel was on his feet before the Court. Said "documents" were a bound volume in excess of 3 1/2 inches thick, and findings were made by the Court on that basis, and on that date, over the strenuous objection of Debtor's Counsel, also on the record.

The Honorable reviewing District Judge outlined the proceedings in his Memorandum and Order of June 27, 2002. He took much of the "facts" he predicated his opinion on from documents that antedated the 60 day period, and failed (as did the Honorable Bankruptcy Judge) to reference the facts as to the source and origins of the Debtor's filings, and the dire and unusual constraints placed on the parties by Debtor's failed health and the theft of his books and records.

Debtor was gravely ill with multiple, life-threatening illnesses, including multiple sclerosis, kidney failure, heart disease (several resucitations) and more, and faced the imminent loss by foreclosure of his horse-farm. Counsel was retained only days before the scheduled Sheriff sale, and a bankruptcy petition filed shortly thereafter, and the schedules were prepared by Counsel with the input and attendance of Debtor's part-time bookkeeper, since Debtor was physically incapable at the time to undergo the rigors of the process, (and in fact at this time was out of the state for his health). The pressing, precipitous and focused issue before the parties was the imminent loss of Debtor's horse-farm, not any other interest or asset Debtor may have owned. The Petition was filed as an emergent filing, without the schedules. Debtor was engaged in a most vituperative and bitter divorce action which was the driving force of the attempted horse-farm foreclosure by his wife, her "companion" and others. Said parties were named in an adversary filing filed by Debtor's Bankruptcy Counsel well within the 60 days of the filing of the Bankruptcy Petition to, inter-alia, obtain the return of the Debtor's papers, records and documents which defined and outlined the Debtor's assets, their nature, location and term(s). Debtor's

Petition and Schedules clearly disclosed and stated that the Debtor's records were taken from him, thus the description of his assets, liabilities and affairs was only such as could be gleaned or determined in their absence. Debtor's wife had previously handled his personal and business financial matters. Debtor's part-time business bookkeeper had in fact, relied on some of the wife's papers that she was able to locate at the business location to assist in the preparation of the Schedules.

Debtor filed the bankruptcy to save his farm from forfeiture, but his complex holdings and other assets had to be outlined as best as possible by Debtor's bookkeeper without any of Debtor's records which his wife had converted at the time she filed the divorce proceedings and evacuated the marital residence. The bookkeeper was employed by Debtor's salon business and had familiarity with some of Debtor's affairs, but in retrospect, not nearly sufficient to complete the Schedules with the degree of accuracy that a review of Debtor's records would require. At no time did Debtor or his later appointed Trustee(s) move to consolidate the corporation in the Debtor's proceedings. It is only after landlord Respondent Vision Properties filed its motion in the Bankruptcy Court and filed documents relating to the nature of the so called "lease assets", that the asset history and scope was disclosed and defined, after the expiration of the 60 day period of Section 365(d)(4). Ownership of the "asset" remains at this date disputed, since Debtor's wife has asserted throughout the divorce and the adversary proceedings that Debtor assigned his said interest(s) to his wife, and the status of the asset is part of the contentions asserted by the Trustee in the amended adversary proceeding he filed,

amending the Debtor's adversary proceeding, and the divorce proceedings. That "interest" though raised by Debtor, was never determined nor reported upon in the summary forfeiture proceedings below.

The relevant income stream referenced in the Debtor's schedules referred to an "installment sale". . . the divorce proceedings referred to an "installment sale". Indeed, Debtor received income from an installment sale in which Respondent Vision Properties was the purchaser, and that income source was listed at Schedule B, # 15 as a Receivable of Debtor by his bookkeeper. The sale related to Debtor's salon, the corporation in which Debtor had the 70 % interest (also contested by his Wife) and the income stream was then believed to be the property of the salon corporation, a separate (though referenced) jural entity, but recited in the Debtor's bankruptcy for full (known) disclosure. The "lease" was not listed in Schedule "G" (Executory Contracts and Unexpired Leases) of the Schedules and Statement of Financial Affairs filed December 18, 2000 because the actual or legal nature of the relationship or asset was unknown both to Counsel or the bookkeeper at the time of the filing of the Petition and Schedules. Debtor was neither fully open with his business associates (i.e. bookkeeper), nor sophisticated in the legal implications of historic transactions that were referenced in these proceedings. He did not reveal nor correct the Schedules as filed by his attorney and bookkeeper. His medical condition was certainly relevant. In fact, the "lease" at issue was entered in 1984, more than 17 years prior. In administering the executory lease function of a bankruptcy, it is normally Schedule G that the parties make determinations on affirmance or disaffirmance. The Respondent Vision

"lease" never "made the screen" given the affirmities outlined above. If same were known to be a "lease" as "bootstrapped" by the Court below with perfect hindsight, it would have been included in Schedule G and reported upon.

Respondent Vision Properties knew of the filing for Debtor Dionisio's bankruptcy as the record clearly showed, before the 60 days and simply waited for the period to run before filing its motion. As the record also clearly revealed, the Chapter 11 Trustee failed to make payment(s) or timely on the "lease" where before the Debtor had caused the payments to be paid on time for the 17 year history. It was the non-payment that precipitated the forfeiture.

SECTION365(d)(4)

Respondent Landlord below argued (and the Court held) that Section 365 (d) (4) created a 60 day, "unequivocal statutory mandate". Debtor argued that there is little in the equity law that is a clear mandate. Section 365 (d) (4) is indeed less a command (mandate) than a forceful administrative guide. The operative word in the statute is "deemed". Webster's Third New International Dictionary includes in the definition of "deem", "to believe", "suppose", "surmise", not mandate. "Deem" is even less an imperative than "shall", and the judicial interpretation of "shall" does not always lead to an injunction. At times, courts have determined that "shall" does not carry an imperative, but sometimes a directory connotation. "May" is normally understood to carry a directive or permissive connotation, and "may" and "shall" sometimes, "have been held to be interchangable when necessary to

implement legislative intent". State v. Jorn, 340 N.J. Super. 192, 196 (App. Div. 2001).

The intent of Congress in the Bankruptcy Code was to equitably administer a debtor's assets, not to forfeit them. Relaxation of an imperative should be used sparingly, but the Courts below, found that Section 365 (d) (4) is a "gestalt-like" methodology. Petitioner asserts it is not, and this finding is a dangerous precedent in the administration of bankruptcy cases. The Bankruptcy and District Courts below cited the Third Circuit Court's opinion In re Channel Home Centers, Inc., 989 F. 2d 682 (3rd Cir. 1993). Yet in Channel, the Third Circuit Court analyzed Section 365(d)(4) and stated:

> "Moreover even unambiguous statutory language need not be followed in those rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" (Citing Cases) (Ibid. at P. 687)

In Channel, it was held that Section 365(d)(4) did not bar a bankruptcy court from granting a second extension of the 60 day rule. The dissent made the point that the 60 day period should be more predictable, yet the majority refused to provide a stringent 60 day mandate to extensions, because "a bankruptcy court (should) consider a particular debtor's need for more time in order to analyze leases in light of the plan it is formulating". (Ibid at P. 689).

In Channel and In re Coastal Industries, Inc., 58 B.R. 48 (Bkptcy. D. N.J. 1986), the Courts had

commercial leases in Chapter 11 cases where the properties were vacant. The cases were not "waiver", "estoppel", or "assignment" of leases cases dealt with infra. In Coastal, the debtor clearly knew of the lease, unlike in the instant case. The facts in each of these cases was different than the instant case. Petitioner's interpretation of Section 365(d)(4) does not obliterate the rule's framework; the rulings below did.

The Bankruptcy Court below failed to exercise its inherent equity powers to avoid what the District Judge admitted was a "harsh" result. There were legal tools and precedents available below to avoid the "forfeiture", which the law has always abhored. Respondent and the District Judge cited In Re: Boston Business Machines, 87 B.R. 867 (Bankr. E.D. Pa. 1988) as authority for the forfeiture. That is curious, because the Boston case held: (a) a commercial landlord (notwithstanding the seeming directive of the Statute that the premises be surrendered), must obtain relief from the automatic stay before obtaining possession (P. 870); (b) must obtain recourse from a state court (disposess) to obtain an eviction order (P. 870); (c) "Applauded" the decisions which extended or limited the administration of the forfeiture provision (P. 871); (d) recognized an "assumption" of the lease as an exception to forfeiture (P. 871); and (e) recognized "waiver" and "estoppel" as exceptions to the literal mandate of the statute (P. 871). Also see In re: Frontier Properties, Inc., 979 F. 2d. 1358 (9th Cir. 1992) which held "assumption" of a lease does not require an order of the Bankruptcy Court. This is not consistent with the holding below of, "unequivocal statutory mandate". Boston also cited (applauded) In re: Pier 5 Management Co., 83 B.R. 392, 393-94 (Bankr. E.D. Va.

1988) to the effect that a landlord is estopped from contesting a belated motion to assume a commercial lease by its refusal to supply information necessary to calculate rent; and cited In re: Ranch House of Orange-Brevard, Inc., 78 B.R. 323, 326-327 (Bankr. M.D. Fla. 1987) to the effect that a landlord waives its right to contest debtor's belated assumption of a lease by accepting rent. In the Boston case, the Court clearly applied its "equitable" powers, by allowing the trading of benefits to avoid, a "substantial hardship on the Debtor requiring it to relocate an apparently prosperous business" (P. 872). No such equity was offered or given to Debtor herein. In the Boston case the Court recognized that the loss of a lease is not the equivalent of the loss of the business. In the instant case, the business and the lease were lost because inter alia, the Trustee didn't pay the rent. In this case, the Debtor and his business were religious in making the "rent" payments through or from his corporate salon, and the landlord accepted several D.I.P. rent checks, fully cognizant of the pendency of a Chapter 11 proceeding for Debtor. The landlord/Respondent's office was in fact upstairs over the salon. It was only after the rent was late, and then not paid by the Trustee, that the forfeiture motion was filed. The fact that acceptance of rents from a Chapter 11 Debtor can create "assumption", "waiver" and/or "estoppel" relief precluding a "60 day" termination of lease was know to Respondent, since it shamelessly tried to fudge the facts below as to the actual notice of the pendency of the Chapter 11 by stating that "Vision was not given any formal notice of the Debtor's filing". Certifications filed below by Debtor (part of this record on the appeal) forced Respondent to fess up to the truth in this regard. There was a similar "rope-a-dope" by the lessor in In re:

T.F.P. Resources, Inc., 56 B.R. 112 (Bkptcy. S.D. N.Y. 1985), which quickly disposed of by the Judge (P. 115, note 4) There too, lessors "managing agent" had actual knowledge of the pendency of the Chapter 11 proceeding of the tenant. There, too landlord accepted a rental check, and waived forfeiture of the lease.

The Respondent-cited Boston case, yielded other similar cases and authority. For example, the above referenced In re: T.F.P. Resources, Inc., case held that a landlord, by accepting rent more than 60 days after debtor's filing of Chapter 11 waived its right under Section 365 (d) (4) to the automatic rejection of the commercial lease, and continued to treat the lease as in effect notwithstanding the deemed rejection. There is an obvious split of authority on this issue in the Circuits, and the Third Circuit in this case didn't rule herein based on its own published cases. The same provision existed in the historic Bankruptcy Act, Section 70(b) as a benefit to commercial lessors, and thus, the benefits of the provision could be waived by them, "notwithstanding the conclusiveness of the self-executing mechanism of Section 365(d)(4) (at P. 115).
The statutory language that the T.F.P. Court analyzed and the string of cases that was cited, also came to the conclusion that "deemed", is not a mandate as stated at PP. 113 and 114 which the Judge termed "sufficiently plain". This is in clear and direct conflict with the findings below that "deemed" is "unequivocal" by plain meaning. Clearly the T.F.P. analysis is the better analysis, given the Congressional mandate of fairness in reorganizations. How was it "fair" for landlord to receive a windfall?

The Respondent-cited Boston case also cited Pier

5 Management, which cited THW Enterprises, Inc., 89 B.R. 351 (Bankr. S.D. NY. 1988). In THW, the Court found the 60 day period for the rejection of a commercial lease waived by landlord's receipt of rent, and the Court gave debtor an extension of time to assume or reject after the 60 days had run The Honorable District Judge below determined to distinguish T.H.W. at P.12 of his Memorandum and Order on the basis that Respondent landlord did not receive "formal" notice of Debtor's filing, a fact not at all clear on the Bankruptcy Court record, nor the subject of discovery, but irrelevant since landlord had actual notice virtually from the Debtor's filing. The fact of actual notice was not disputed. THW began as follows (virtually on point):

> "This is one of those unfortunate cases where a debtor, through inattention to the mandates of the .. . . Code respecting non-residential leases, possibly stands to lose its most valuable asset to a lessor whose rent has suffered no harm from the existence of these proceedings save for the non-payment of rent for the one month during which the Chapter 11 case was filed, and who would reap a windfall from the debtor's error". (P. 352)

IN THW, the lessor was informed from the outset of the pendency of a Chapter 11; during the pendency of the Chapter 11 landlord accepted the rent; neither debtor nor landlord moved to assume or reject under Section 365 (d) (4); landlord did not manifest an intention to terminate the lease nor advise that it was waiving any protections. (P. 352). Landlord argued the bankruptcy

court was "powerless" to permit assumption of the lease under Section 365(d)(4) (P. 354), (consistent with Appellee's argument herein as to an "unequivocal statutory mandate"), and that "nothing may interfere with the revesting of the premises in the "landlord". (Id.) The THW Judge replied thereto:

> "We do not agree with the Lessor's draconian interpretation of the statute, but believe that the concepts of waiver and estoppel which were applied under the former Bankruptcy Act to prevent inequitable forfeitures inhere in the Code as well" (Id.) (emphasis ours).

The THW Court demonstrating a split in authority on these issues chose not to follow certain Ninth Circuit analysis, observing that the cases, "did not deal with issues of waiver and estoppel by reason of the landlord's conduct" (Id). The Court's analysis in THW would clearly apply to the Channel and Coastal cases relied upon below, where there were no waiver, estoppel or assignment "exceptions" issues taking those cases out of the 60 day rule. Citing a Texas case, it was stated, "where executory contract is not scheduled and trustee has no knowledge of it and could not have obtained knowledge of it, trustee is nonetheless vested with the contract and is not presumed to have rejected it; accord 2L. King, Collier on Bankruptcy, Section 365.03 at 365.25-26 (15th ed. 1988)". (Id.). Also see 3 Collier on Bankruptcy, 15th ed. Section 365.04[1][A] , P. 365-29. In the instant case the factually relevant issues of knowledge, extent thereof, waiver or estoppel was not allowed to be fleshed out in any discovery process nor in an evidential hearing.

The THW Court refused to follow authority cited by the lessor that, "acceptance of rent after expiration of the 60 day period regardless of the length of time over which rent was accepted and the landlord's knowledge of the bankruptcy could never constitute an estoppel" (P. 355). THW similarly refused to follow authority, "for the proposition that Congress intended to deny flexibility to debtors when it enacted section 365(d)(4) ". and cited authority, "that principles of waiver and estoppel are available to defeat the operation of section 365 (d) (4) ". (Ibid. at P. 355). The three exceptions to forfeiture, i.e. assumption of lease by conduct rather than timely motion to assume, waiver and estoppel, were considered by the Court. "(W)e concluded that prior law concerning waiver and estoppel was still good law and that there are unusual cases where the landlord may be deemed to have waived or be estopped from asserting the rejection by operation of law' . . . The judges in this district have consistently adhered to this same view. *** If waiver was not applicable, even in extreme circumstances, harsh results are conceivable". (Id.)

Citing inter alia, the Pier 5 Management case, cited in the Boston Business Machines case, the THW Court held virtually in point:

> "One could imagine the inequities if a landlord accepted rental payments from a debtor/lessee for years during the pendency of a Chapter 11 reorganization, only to pull to rug out from under the debtor if the market value of the lease appreciated. The landlord would essentially reap a windfall and would have all the benefits of

> the bargain with the ability to terminate the contract at any time". (Id) . Continuing, . . . "the courts do not favor forfeitures" (citing cases) *** "With these cases as a backdrop, we believe that those courts err which dismiss out of hand waiver and estoppel recognized under prior law to preclude forfeitures" (citing cases) . (Ibid. at P. 356) (emphasis ours),

The Court observed that the Lessor in THW was fully aware of the Debtor's bankruptcy. "The fact that the Lessor knew it was dealing with a Chapter 11 debtor placed it on notice that its rights and duties in relation to that debtor would be altered.... . The actual notice of the debtor's bankruptcy constructively imputes the knowledge of the Code and its provisionss to the Lessor". (Id). As to how the Court should determine these issues, "requires an analysis of the facts of each case" (Id). The Honorable District Judge below at P. 9 of his Memorandum and Order stated that the Debtor "was well aware" of the existence of the Master Lease, without any proofs as to what it was that he was aware of, vis-a-vis his personal estate or the jural salon business of which he was the 70 % shareholder. It is not impudent to observe that the Debtor who died twice in the time frame referenced, could conceivably not be "aware" of much more than his mortality. The lease was almost two (2) decades old, and was previously part of an extremely complex installment sale. The "reporting" made was the best guess Debtor's bookeeper could make in the absence of the gravely ill Debtor, or his records, which were stolen by his nefarious wife with the assistance of her "companion".

The THW Court also cited the In re: T.F.P.

Resources case, also cited in the Boston Business Machines case to the effect that it, "could envision cases where acceptance of payments due under the lease could, in tandem with other facts, constitute a "waiver" (Id). The Court also acted "equitably" and allowed the Debtor to assume the lease after the 60 days ran, but required debtor "cure" the rent default, compensate lessor for the default, and provide adequate protection. (Ibid at p. 357). "The default is negligible and the history of payment impeccable."(Id.). The Court found no damage to the lessor, rent was being paid, and, "Recapture of the premises by the Lessor would give it a windfall". (Id). The THW case as referenced above is virtually in point with the facts in the instant case, and should have been the divining precedent. A 60 day "drop dead" rule would certainly move bankruptcy cases, but Congress didn't want them moved, it wanted them adjudicated by a "judge" not processed by an administrator. It was the law in the Bankruptcy Act before the Code, i.e. Larkins v. Sills, and before and during the Code: "The Bankruptcy court is a court of equity" (Id).

In all of these cases, the "trustee" was aware (knew) of the asset or its existence. In the Coastal Industries case, the bankruptcy judge had a case where the administration of a known lease was defective as to determinations to reject or affirm in the 60 day administrative time-frame. The Coastal and Channel cases both discussed Congressional intent to come to their determination. In Coastal, the intent or purpose of a definitive rule, was to, "force the trustee or debtor in possession to make a quick decision thereby eliminating the problem of extended vacancies". (emphasis ours). That same Congressional purpose was

cited by Third Circuit Judge Hutchinson in his dissent in Channel (989 F. 2d @ P. 689). That makes sense! Why should a trustee "speculate on the market for commercial real estate during the prolonged period of uncertainty...". (Ibid @ p. 690). In the instant case, the property was not vacant. . .it was occupied and current on its rents. . . it housed a 42 year old salon business that fed and clothed 37 employees and provided them medical coverage and other beneficial perquisites. Reorganization is to save businesses, not to forfeit them. There was an inexplicable factual and intellectual disconnect in the instant case. With the severe harm inflicted by the Court's decisions below, the Bankruptcy Court stated, "There is no evidence that Debtor's loss of the lease will result in irreparable harm to him". Even the District Judge found the result "harsh". In Collier, citing In re: Jackson, 190 B.R. 808, 811 (W.D. Va. 1995) (citing Federal Deposit Insurance Corp. v. Colonial Realty Co., quoting 1 Story's Equity Jurisprudence), the treatise referenced the relief valve of equity when, "the law.. .is defective by reason of its universality". Section 105 of the Code is a statutory relief valve. In applying the "Balance of Harms" (2 Collier at Section 105.02 [1] [ci, the Court below gave no weight to the effect of a forfeiture to the Estate and the absolute windfall to the "landlord". This summarily occurred contrary to the "public policy in favor of reorganizations". Can Section 365 (d) (4) be, "the time bomb that begins ticking relentlessly and irresistably upon entry of the order for relief"? (Coastal @ P. 50) . But Channel Lumber began its analysis recognizing the relief valve in "rare cases" where the "literal application of the statute will produce results demonstrably at odds with the intentions of the drafters".

SECTION 365 (D) (1)

The Bankruptcy and District Judges in their opinions below concluded, that a Trustee does not obtain a new 60 days to assume or reject a commercial lease if 60 days had run in the matter before his appointment. There is clear and cogent authority to the contrary, and which makes more sense in the context of the Congressional intent to reorganize, not liquidate debtors, and treat creditors with equanimity. Debtor argued alternatively below for conversions to Chapter 7 under Section 112 (b) and Section 348 (c) to enable the new Trustee a second 60 days to affirm the lease. The Trustee herein filed a pleading indicating his determination to do so if allowed. The Legislative History of Section 348 (c) to the 1978 Acts specifically states, "and that the time the trustee. . . .has for assuming or rejecting executory contracts recommences, thus giving an opportunity for the newly appointed trustee to familiarize himself with the case". (emphasis added)

Debtor cited below In re: Joyner, 74 B.R. 618 (Bankr. N.D. Ga. 1987) which held a trustee gets a new 60 days from the date of conversion (to Chapter 7) to act upon the lease. Also see In re: Lavigne, 114 F. 3d 379, 386 (2nd Cir. 1997); and 3 Collier on Bankruptcy, 15th Ed., Section 365.04 (1) (a). The above cited Collier treatise stated:

> "If the Trustee fails to act within the sixty-day period, the contract or lease is deemed rejected. If, however, the contract is not scheduled and the Trustee does not

> discover it, the presumption of rejection should not apply. If the sixty- day period expires, absent laches or waiver, the court has no power to extend it thereafter. When a case is converted from another Chapter to Chapter 7, the sixty days will run from the date of conversion".

The cases cited above by Petitioner held "laches" or "waiver" (and assumption) as exceptions to the 60 day mandate. If the 60 days were excepted by lessor conduct, then the 60 days did NOT run in the Chapter 11; and it follows by the above authority that it certainly did not run against a Trustee on the conversion of a case to Chapter 7. All of the authority cited below to the effect that the 60 day rule is immutable, are cases where the "exceptions" were not issues in the cases. That was made clear in the THW case supra. refusing to, "agree with the Lessor's draconian interpretation of the statute....". In THW the Court distinguished the "immutable" 60 day cases by stating they, "did not deal with the issues of waiver and estoppel by virtue of the landlord's conduct" (Ibid. at P. 354). The THW Court also held a trustee is not presumed to have rejected a contract (citing Collier) (Id). All of the above authority was "applaud" (ed) by the Court in the Boston Business Machines case, which the District Judge below cited for forfeiture.

The Senate note in the Legislative History stated as above, that the period (60 days) "recommences". Nowhere in the history of this section is there a hint that in the situation herein, which meets the literal requirements of Section 365 (d) (1), that a "recommencement" would not apply. The Courts

below rendered the Senates "recommencement" comment to its work, useless furniture.

DUE PROCESS

The proceedings below were both expedited and summary. There was no discovery, or factual and evidential hearings. Discovery was Respondent's counsel dropping the 3 1/2" binder on Counsel table while Debtor's counsel was "on his feet" on the motion. This was done on the record, and Counsel objected to the process and asserted same raised serious procedural due process issues. Counsel had no available client at that moment, since Debtor was undergoing another serious surgery. Debtor was denied his records and documents, converted by his wife, and the dispatch to forfeiture was palpable as compared to the progress on the records/documents turnover proceedings in the timely filed adversary proceeding. The clarity of a confused, complex series of transactions between Debtor and Respondent older than 17 years, including an installment sale of a limited partnership interest could have never been dealt with sua sponte but it was.

Bankruptcy matters are handled principally with motion process. Records can be made summarily, but not all proceedings can be administered with such "efficiency" as to deprive the entire matter of appropriate or due process. The subject of landlord's "motion" contained in it the possibility of forfeiture of Debtor's business, not just the termination of the lease. The importance to the reorganization required more than mere expedition. A violation of due process can render a judgment void. Simer v. Rios, 661 F. 2d 655,

663 (7th Cir. 1981). Denial of an evidentiary trial may be a denial of due process sufficient to make a judgment void. Cf. Great American Trading Corp. v. I.C.P. Cocoa, Inc., 629 F. 2d. 1282 1287-1288 (7th Cir. 1980).

STANDING

The record showed that the motion for forfeiture was precipitous and inexplicably expeditious, and unnecessarily so. Debtor's Counsel, given Debtor's infirmed state, had more werewithal and relative access to information to quickly react and defend, as compared to the recently appointed Chapter 11 Trustee. Debtor's Counsel responded immediately to the short-notice motions. There was never a "standing" issue until raised in the Third Circuit Court. The Trustee did not object to Debtors defense of the "asset", rather, the Trustee in a writing, and on the record, advised he would affirm the lease if the proceedings resulted in other than a forfeiture. The Trustee de facto adopted Debtor's defense of the motion. The issue of Trustees authority under 11 U.S.C.A. Section 541 (a) and Bankruptcy Rule 6009 was never in issue. There was the issue of the Trustee failing to pay, certain rent payments that precipitated the forfeiture filing in the first place. The asset disappeared in a motion cycle, at least the time it would have required to have a formal appointment of Debtor Counsel to defend the matter.

Debtor is a "party in interest" in Section 1109 (b) and as such, may raise, appear and be heard directly on "any issue" in a Chapter 11 case. There is no question a Debtor holds a financial stake in the outcome of the case. Collier on Bankruptcy, Section 1109.01 [1], P. 1109-4. The concept of "standing" was clearly

erroneously applied in the Circuit Court. Debtor did not commence litigation, he defended it. "(A) distinction must.. .be drawn between the right of a party in interest' to participate in a proceeding and the right to commence litigation on behalf of the estate". Collier Ibid. at Section 1109.01 [4], p. 1109-7. In the instant case, the Respondent "Companion" of Debtor's wife had standing, but the Debtor did not? Incredible! Debtor took the appeals that brought this unhappy case to this Court. "In general, in order for a person to be a proper party to take an appeal, he or she must be a 'person aggrieved' if the decision in question adversely affects his or her pecuniary interest". (Id.) The Third Circuit's decision on standing is against its own authority in In re: Marin Motor Oil, Inc., 689 F. 2d. 445 (3rd Cir. 1982), cert. den. 459 U.S. 1206 (1983). Debtor has standing as having a "zone of interest", comporting with the limitations of the case or controversy requirement of Article III of the Constitution. Debtor also surely is affected by "the ultimate disposition of the party's stake in the Chapter 11 case". (Ibid. at Section 1109.04 (4), P. 1109-39.).

Very recent cases, one a Third Circuit case, and the other a decision of the Bankruptcy Judge below demonstrate the holdings in the instant case were wrong. In In re: Cybergenics Corp., 3 Cir., DDS # 42-8-4004 decided 5/29/03 the creditor's committee was authorized to sue derivatively to avoid fraudulent transfers, and Section 544 (b) was held not to vest exclusive standing in the trustee. In In re: G-1 Holdings, Inc., Bk Ct NJ, Docket # 01-30135, decided 5/8/03, Judge Garnbardella also ruled the trustee is not the only party to bring an action to avoid a transfer and the creditors committee was authorized to bring the action.

Citing Marin Oil at P. 457, "a broad reading of Section 1109(b) comports with the usual expectation of parties in interest that they would have the right to be heard as parties in interest by the tribunal adjudicating their interests".

CONCLUS ION

The instant case is not just about a great injustice inflicted upon a debtor's estate in a bankruptcy proceeding, it is also about summary proceedings being short and immediate to the point of denying the party(s) due process of law; it is about the confusion of the bankruptcy case law in different jurisdictions on the issue of the affirmance/disaffirmance of commercial leases; and also the misapplication by the Court's below of the Third Circuit Court's own precedents.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

ERNEST R. NUZZO
Counsel for Debtor/Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3020

IN RE: THOMAS A. DIONISIO,
Debtor

THOMAS A. DIONISIO,
Appellant

v.

U.S. TRUSTEE'S OFFICE;
VISION PROPERTIES OF FAIRLAWN I, LLC;
JAMES A. SCARPONE, Chapter 11 Trustee;
VICTOR FISCHETTI

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR
THE DISTRICT OF NEW JERSEY

(Dist. Court No. 01-cv-04566)
District Court Judge: Hon. John C. Lifland

Submitted Under Third Circuit LAR 34.1(a)
April 7, 2003

Before: ALITO, FUENTES, and GREENBERG,
Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a).

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court entered on June 28, 2002, be and the same is VACATED, and the case is remanded for further proceedings. All of the above in accordance with the opinion of this Court. Costs taxed against appellant.

ATTEST:

s/Marcia M. Waldon
Clerk

Dated: 17 April 2003

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3020

IN RE: THOMAS A. DIONISIO,
Debtor

THOMAS A. DIONISIO,
Appellant

V.

U.S. TRUSTEE'S OFFICE;
VISION PROPERTIES OF FAIRLAWN I, LLC;
JAMES A. SCARPONE, Chapter 11 Trustee;
VICTOR FISCHETTI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

(Dist. Court No. 01-cv-04566)
District Court Judge: Hon. John C. Lifland

Submitted Under Third Circuit LAR 34.1(a)

April 7, 2003

Before: ALITO, FUENTES, and GREENBERG,
Circuit Judges.

(Opinion Filed: April 17, 2003)

OPINION OF THE COURT

PER CURIAM:

Appellant Thomas Dionisio, a debtor in chapter 7 bankruptcy, appeals the District Court's dismissal of his appeal from a Bankruptcy Court's order to surrender a leasehold. We find that Dionisio lacks standing and that neither this Court nor the District Court has jurisdiction to review the Bankruptcy Court's decision.

On October 26, 1983, Dionisio began leasing 14,487 square feet of commercial space at 21-21 Broadway in Fairlawn, New Jersey ("the Property"), from 21-21 Broadway Associates ("21-21"), a partnership of which Dionisio owned one quarter. The lease agreement ("the Master Lease") set a term of 20 years, fixing the rent for the first 10 years and establishing a formula for calculating the rent through the second decade. In 1984, Dionisio subleased 8,787 square feet to Artistic Academy. At the time the sublease began, Dionisio owned a portion of Artistic Academy, but he divested fully by 1986, making Carmen DePasquale its sole owner.

DePasquale formed Vision Properties in 1997, and Vision purchased the Property from 21-21, assuming $1,784,908.20 in mortgage payments and pledging $922,591.80 to the seller, to be paid monthly over ten years. Dionisio's interest in 21-2 1 entitled him to a share of the monthly payments, and Vision, as the successor to 21-21's rights under the Master Lease, became Dionisio's landlord. In 1999, following a legal dispute between Dionisio and Artistic Academy, Vision purchased Dionisio's interest in the Artistic Academy sublease for $400,000.

Dionisio filed for chapter 11 bankruptcy protection on

November 22, 2000. Dionisio's bookkeeper and counsel prepared the required Schedule of Assets and Liabilities, see FED. R. BANKR. P. 1007(b)(1), and filed those documents on December 18. Schedule A, documenting Real Property assets, acknowledged the Master Lease and estimated its gross value to Dionisio at $146,800 annually. Schedule B and D, respectively, noted his interests in 21-21 and in the income stream from the sale of the Property to Vision. Dionisio did not move to assume or reject the Master Lease. Under the pertinent provision of the Bankruptcy Code,

> in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief; or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (2003).

By order of the Bankruptcy Court, James Scarpone was appointed Dionisio's trustee in bankruptcy on April 6, 2001. Vision moved in the Bankruptcy Court for equitable relief requiring the trustee to surrender the debtor estate's interest in the Master Lease for failure to assume the lease or move for additional time within the 60-day period. Scarp one cross-moved to convert the case to a chapter 7 proceeding. See 11 U.S.C. § 1112 (2003). Dionisio presumed that conversion would recommence the tolling period, and he additionally argued for an equitable exception to section 365's deadline. Scarpone conceded that Dionisio had failed to move to assume the lease within the 60-day period.

Citing In re Channel Home Centers, Inc., 989 F.2d

682, 686 (3d Cir. 1993) (describing section 365 as "unequivocally provid{ing] that a lease must be deemed rejected unless the trustee assumes it before the 60-day period expires or obtains an extension"), and In re Coastal Indus., 58 B.R. 48, 50 (Bankr. D. N.J. 1986), the Bankruptcy Court deemed the Master Lease rejected and ordered the surrender of the leasehold to Vision. The Court also granted Dionisio's cross motion to convert the case to a chapter 7 proceeding, while noting that conversion would not prevent a forfeiture of the Master Lease. See In re Maralak, Ltd., 104 B.R. 446, 449 (Bankr. M.D. Fla. 1989) ("The conversion of a case from chapter 11 to chapter 7 does not erase the prior proceedings."). Dionisio appealed to the District Court, which dismissed the appeal on June 27, 2002, based upon substantially the same reasoning employed by the Bankruptcy Court. Before this Court, Dionisio argues that the Bankruptcy Court and the District Court erroneously failed to interpret section 365 equitably and that the appointment of Scarpone as trustee should have recommenced the tolling.

Vision, however, argues that Dionisio lacks standing to appeal and that the case must therefore be dismissed for lack of jurisdiction. We agree. The Bankruptcy Code provides that the trustee in bankruptcy "is the representative of the estate" and "has capacity to sue and be sued." 11 U.S.C. § 323(a), (b) (2003). "As a general matter, in a chapter 7 proceeding, the trustee alone has standing to raise issues before the bankruptcy court and to prosecute appeals." In re Richman, 104 F.3d 654, 657 (4th Cir. 1997); see also In re New Era, Inc., 135 F.3d 1206, 1209 (7th Cir. 1998); In re Eisen, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994); In re Educators Group Health Trust, 25 F.3d 1281, 1284 (5th Cir. 1994); In re Thompson, *965* F.2d 1136, 1143 n.12 (1st Cir. 1992); Jones v. Harrell, 858 F.2d 667, *669* (11th Cir. 1988).

Standing is subject to review at all stages of litigation because a lack of standing undermines the jurisdiction of the court we review as well as our own. See generally Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546-47 (1986). As chapter 7 trustee, Scarpone alone had standing to appeal the decision of the Bankruptcy Court, and the District Court's implicit assertion of jurisdiction to review the merits of the Bankruptcy Court's decision was consequently in error. We must therefore vacate the judgment of the District Court and remand for entry of an order dismissing for lack of standing.

IT IS THE DIRECTION OF THIS COURT THAT THE SUCCESSFUL PARTY SERVE A FILED COPY OF THIS ORDER UPON ALL PARTIES TO THIS ACTION.

WOLFF & SAMSON
A PROFESSIONAL C0RPORATION
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ROSELAND, NEW JERSEY 07068
973-740-0500

FILED
JAMES J. WALDRON, CLERK
AUG 28 2001
U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY.s/Sandra RadiceDEPUTY

Karen L. Gilman, Esq. (KG/5161)
Attorneys for Vision Properties of Fairlawn I, L.L.C.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:

THOMAS A. DIONISIO

Debtor.

Chapter 11
Case No. 00-41371(RG)

Hearing Date: August 17, 2001 10:00 a.m.

ORDER DIRECTING JAMES A. SCARPONE, CHAPTER 11 TRUSTEE OF THE DEBTOR, TO SURRENDER LEASED NONRESIDENTIAL REAL PROPERTY TO LANDLORD VISION PROPERTIES OF FAIRLAWN I, LL.C.

THIS MATTER having been opened to the Court by Wolff & Samson, P.A., attorneys for Vision Properties of Fairlawn I, LLC., ("Vision" or "Landlord") upon its motion for an order directing the Debtor to surrender certain leased nonresidential real property to Vision, and for such other and further relief as this Court deems just and proper (the

"Motion"), and the Court having read and considered the briefs and certifications filed in support and in opposition of the Motion, and a hearing on the Motion having been held on July 17, 2001, and based upon the evidence presented and having heard oral argument, and for good cause having been shown as detailed in the opinion of the Court set forth on the record on August 17, 2001,

IT IS on this 28th day of August, 2001,

ORDERED that:

1. The Master Lease (as defined in the Motion) be, and hereby is, deemed rejected;

2. The rights of the Debtor's estate under the Master Lease be, and hereby are terminated;

3. Upon entry of the Within Order, James Scarpone, the Debtor's Chapter 11 Trustee, shall within five (5) business days surrender possession to the Landlord of the nonresidential real property described in the Master Lease, as modified;

4. The Chapter 11 Trustee shall pay to Visions the post-petition rent due under the Master Lease for the months of June, 2001, July, 2001 and August, 2001 in the amount of $16,646.04 ($5,548.68 per month) within five (5) business days of the entry of the within Order; and

5. Visions shall be authorized to file a claim for C.A.M. charges for the year 2000 and for the first four months of 2001, as well as any lease damage rejection claim, and any claim pursuant to N.J.S.A. 2A:42-5 and N.J.S.A. 2A:42-6, if any, within thirty (30) days of the entry of the within Order.

s/Rosemary Gambardella
ROSEMARY GAMBARDELLA
Chief United States Bankruptcy Judge

COPY

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
CASE NO. 00-41371

IN THE MATTER OF:

THOMAS A. DIONISIO, DECISION

Debtor.

Martin Luther King, Jr.
Federal Building & Courthouse
50 Walnut Street
Newark, New Jersey 07102
Friday, August 17, 2001

BEFORE:

THE HONORABLE ROSEMARY GAMBARDELLA

Reported By:
MARY ANN ADAMS
Certified Shorthand Reporter

REPORTING SERVICES ARRANGED THROUGH
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Pro Se

ALSO PRESENT:

JOHN BOBER

THE COURT: The parties want to come up and be seated at counsel table. In the matter of Thomas Dionisio. Let me have the appearances of the parties in court today.

MR. ROSENBLATT: Raphael Rosenblatt from Hellring, Lindeman, Goldstein & Siegal on behalf of the Trustee, James Scarpone.

MR. NUZZO: Ernest Nuzzo for the Debtor.

MS. GILMAN: Karen Gilman, Wolff & Samson, on behalf of Vision Properties.

MR. DUVA: Giacomo Duva on behalf of Fatcar Farms and Giacomo Duva.

MS. DIONISIO: Laura Nelson Dionisio, Pro Se.

MS. ALBANO: Kathleen Albano, Pro Se.

MR. FISCHETTI: Victor Fischetti, Pro Se.

MR. NUZZO: Mr. Bober showed up again this time. I'm not sure exactly what his position is here, but he did have a say last time.

THE COURT: Do you want to give me your name for the record?

MR. BOBER: John Bober.

THE COURT: Okay. Let me read my decision, then we can take up any other matters on the calendar.

Before the Court is a motion brought by Vision Properties of Fair Lawn I, L.L.C., for an Order directing Thomas A. Dionisio, or now his Chapter 11 Trustee James Scarpone, to surrender their interest in nonresidential real property on the basis that the Debtor did not file a motion to assume or reject the lease, nor did the Debtor seek an extension of time to assume or reject the lease, within the 60-day time period provided by Section 365(d) (4) of the Bankruptcy Code. Vision also sought in its original motion payment from the Trustee for certain unpaid C.A.M. charges for year 2000 and the first four months of year 2001 in the amount of some $2,524.96 and all accrued post-petition rent in accordance with Section 365(d) (3) of the Bankruptcy Code.

The Debtor, through counsel, has filed opposition to the motion, arguing that this Court should utilize its equitable powers to prevent what is characterized as a draconian result. Mr. John Bober, who claims to be a 30% owner of Anthony's, Incorporated, also

appeared in opposition. In addition, the Debtor filed an "Alternative/Contingent Cross-Motion" that requests conversion of this case from a Chapter 11 to a Chapter 7 or, alternatively, dismissal of the case. The Trustee subsequently filed an Application in support of the Debtor's request for conversion. The Trustee, by letter of his counsel dated June 29th, 2001, stated to the Court that he saw no reasonable basis on which to oppose Vision's original motion, but expressed no opinion or position on the equitable arguments made by the Debtor. Giacomo Duva, individually and on behalf of Fatcar Farms, and Laura Dionisio filed separate certifications, arguing for dismissal of this case in lieu of conversion to a Chapter 7.

This Court conducted a hearing on July 17th, 2001. The following constitutes this Court's findings of fact and conclusions of law.

21-21 Broadway Associates Partnership is a limited liability partnership in which the Debtor has a 25% partnership interest. On October 26, 1983, Broadway Associates, as fee owner of a 55,000 square foot building located at 21-21 Broadway, Fair Lawn, New Jersey, entered into a lease, referred to as the "Master Lease," for 14,487 square feet of the building with the Debtor for a term of 20 years with two 10-year renewal options.

On or about January 1, 1994, the Debtor entered into a Sublease, leasing to Artistic Academy 6,112 square feet of the Leased Space. That portion of the building was on the second floor of the building. The term of the

lease was from January 1, 1984, through December 31, 1998, with three 5-year renewal options.

Artistic Academy is an entity that operates a state-licensed cosmetology school. At the time of the Sublease, Artistic Academy was owned by the Debtor and Carmen DePasquale. Subsequently, in 1986, the Debtor sold his interest in Artistic Academy to DePasquale, who then became the owner and sole shareholder.

Around the same time that the Debtor sold his interest to DePasquale, the Debtor and DePasquale negotiated several amendments to the Sublease. The First Amendment to the Sublease occurred on October 1, 1986, and increased the subleased space from 6,112 square feet to 8,787 1 square feet. On December 9, 1993, the parties entered into a Lease Modification and Extension, which extended the lease term from January 1, 1994, to December 31, 1998, and increased the monthly rental during the extension term to $9,519.25 per month. On September 28, 1995, the parties executed an Addendum to the Sublease, which extended the Sublease to December 31, 1997, increased the monthly rent to $11,938.61, and modified the renewal options to one 1-year option with a 5% increase from January 1, 1998, to December 31, 1998, plus two 5-year options.

In or around September 1997, DePasquale formed the entity known as Vision Properties of Fair Lawn I, L.L.C., for the purpose of purchasing the 21-21 Broadway property. Vision is a limited liability company whose only members are DePasquale, his wife, and his children. In May of 1997, Vision entered into an Installment

Sale Agreement with Broadway Associates pursuant to which Vision acquired, among other things, all of Broadway Associates' right, title, and interest in and to the Master Lease for a total purchase price of $2,707,500.00. Vision agreed to pay Columbia Savings Bank, the first mortgagee, $1,784,908.20 in monthly installments of principal and interest for ten years and Broadway Associates $922,591.80 in monthly installments for ten years. The Debtor's 25% income stream from Broadway Associates is listed as monthly income on his Schedule of Personal Property. Accordingly, as a result of the installment sale, Vision became the assignee of the Master Lease between the Debtor and Broadway Associates.

Vision contends that Artistic Academy and the Debtor were negotiating an extension of the Sublease after December 31, 1998, when the Debtor alleged that the right to any extension had expired. On or about March 17, 1999, the Debtor served a demand for possession on Artistic Academy for the Second Floor Space. In March of 1999, the Debtor filed a Complaint in the Superior Court of New Jersey, Bergen County, Law Division, to regain possession. Ultimately, the Debtor and Vision reached a settlement in May of 1999. Pursuant to that Settlement, the Debtor agreed to surrender to Vision his interest in the 8,787 square feet of subleased space in consideration for payment of $400,000. As a further result of the agreement, the Master Lease 1 was modified to reduce the space leased to the Debtor to only 5,700. square feet and proportionately reduce the amount of the base rent.

On November 18th, 2000, the Debtor met with his attorney, Ernest Nuzzo, to discuss the filing of a bankruptcy petition. On November 22, 2000, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this court. The petition was filed on an emergent basis due to the imminent foreclosure of the West Milford property that was scheduled for on or about November 28, 2000.

The Debtor's Schedules were filed subsequently on December 18th, 2000. According to the Debtor, the Schedules were prepared principally by the Debtor's bookkeeper, Beverly Carlson, with the assistance of the Debtor's attorney. The Debtor states that he suffers from several illnesses, including muscular sclerosis, kidney failure, and heart disease, and asserts that at the time the Schedules were being filed, he was out of state recuperating. According to Debtor's counsel, the Debtor is all but bound to a wheelchair due to his condition.

On the Debtor's Schedule A of Real Property, he lists the Master Lease for 6,000 square feet at the subject location. In the Debtor's Schedule B of Personal Property, he reflected his 25% interest in Broadway Associates. His Schedule D indicated the assignment of his 25% •interest in the income stream from the sale of the building by Broadway Associates to Vision, noted as an assignment to Bergen Commercial Bank as collateral for a home mortgage. Further in the Disclosure Statement filed by the Debtor on March 26, 2001, the Debtor stated that the "Debtor is the owner of a Master Lease on 21-21 Broadway (location of salon) the

owner of the building being Vision Properties." In that same Disclosure Statement, the Debtor stated that he owned 70% of Anthony's, Incorporated, a New Jersey corporation established by his father in 1939, which was described as a full-service beauty salon and spa business in Fair Lawn. The Disclosure Statement further provided that the Debtor formerly owned 100% of the stock but sold 30% to his "partner" John Bober in 1991, who is described as a Vice President at the present time. Paragraph 26 of the Disclosure Statement indicated that, "Said Master Lease, which covers the salon and an adjacent third party pizza business, is a valuable asset of this estate being a 20-year lease with a 20-year option to renew." The Disclosure Statement further provided, "Debtor further has an interest (as former 25% limited partner in title) in the income stream from the installment sale proceeds received from the purchaser, which is a valuable asset of the estate. The income shown was ultimately assigned to Defendant Laura Nelson Dionisio to assign to the mortgage company as collateral for the purchase of the parties' marital residence."

Again, the Statement of Financial Affairs filed by the Debtor shows income to the Debtor from the sale of Broadway Associates, and same was presented as income from an "installment sale." Moreover, the Executory Contracts Schedule did not list any lease with Vision. In addition, the Debtor did not list Vision as a creditor on the Schedule of Creditor or the Creditor Matrix, nor was the Master Lease listed on the Schedule of Executory Contracts and Unexpired Leases. Accordingly, Vision claims that it did not receive official notice that the Debtor at the time had

filed for bankruptcy. However, it does appear that Vision did receive actual notice certainly by way of rent checks issued in January 2001, February 2001, and March 2001, which were drawn on a Debtor-in-Possession account.

There's also in this record some conflicting evidence as to the issue of actual notice. James Savino, controller of Vision, originally claimed that Vision did not receive any notice of the bankruptcy filing from the Debtor or the Court. Conversely, the Debtor argues that Mr. Savino's representation is not accurate, that, in fact, Vision's office is in the same building at the same address as Anthony's salon business, Artistic Academy, and Debtor's office. The Debtor therefore alleged that the subject of the bankruptcy was the subject of discussion among the persons on the premises at an earlier time. Furthermore, Beverly Carlson claims that she personally delivered Debtor-in-Possession rent checks to Mr. Savino in February, and that Mr. Savino noticed that the checks were drawn on a D.I.P. account. Ms. Carlson also claims that Mr. Savino said that he would inform Mr. DePasquale. Ms. Carison also claims that she called Savino on or about May 23, 2001, after the May rent fell late, to inform him that a Trustee had been appointed and would be paying the rent. In its reply brief to the Court, Vision claims that it was not given "formal" notice of the bankruptcy filing until the Trustee's payment of rent on or about May 30, 2001.

On January 17th, 2001 the Debtor filed a Complaint in this court (Adversary Number 01-3031) against numerous parties, including his estranged wife, Laura Nelson Dionisio. The Complaint sought various relief, including injunctive relief, declaratory relief, and

damages. Laura Nelson Dionisio and the Debtor have separated, and divorce proceedings are pending in the Superior Court of New Jersey, Bergen County, Chancery Division, before the Honorable Elijah Miller, Judge of the Superior Court. In one count of the Adversary Complaint, the Debtor sought a turnover of records and documents that the Debtor alleged Ms. Dionisio deprived him of. The Debtor certified in that Complaint that when Ms. Dionisio left the marital dwelling without, according to the Debtor, prior notice on November 7, 2000, she took with her documents and legal papers in the home. It also appears here that Ms. Dionisio claims that she is a 70% owner of Anthony's, Incorporated. The Debtor points to Ms. Dionisio's Reply Certification to the Adversary Complaint filed on March 8, 2001, and Debtor argues that those replies contain certain documents which he alleged were taken from the home. See, for instance, Exhibit G to that Reply, a copy of an Assignment by Gift of the income due from Broadway Associates, which was assigned and collateralized to Bergen Commercial Bank, and Exhibit N, which acknowledges receipt of a box of the Debtor's records held at the offices of Fatcar Farms' owner.

It is undisputed on this record that the Debtor did not file a motion to assume or reject the Master Lease, nor did the Debtor request an extension of time to assume or reject the Master Lease, within the 60-day time period provided by section 365(d) (4) of the Bankruptcy Code. The Debtor claims here that he could not verify that he was the tenant under the Master Lease because of the relevant documents taken from

his home as referenced in the aforementioned Adversary Complaint.

The Debtor also claims in affidavits before this Court that it was not clear to him that the Master Lease was owned by him personally and not collaterally by Anthony's, Incorporated. The Debtor claims that he had some recollection of a 20-year lease with Vision, however, he had no documentation because he alleges Ms. Dionisio took all relevant lease documents with her when she left the marital dwelling on November 7 2000. The Debtor does admit paying rent with personal checks, but claims that the funds came from Anthony's.

It is also claimed here that it was not until the July 17, 2001, hearing that Debtor's counsel saw a copy of the closing binder, which included the installment sale contract, for the sale of the 21-21 Property.

On or about March 15, 2001, Vision sent a letter to the Debtor reflecting unpaid C.A.M. charges for the year 2000, updating the 2001 C.A.M. charges based upon the prior year accounting, and setting new monthly C.A.M. charge rates effective January 1, 2001. That letter indicated unpaid charges for the relevant period of some $2,524.96.

On March 21, 2001, the Debtor filed a Plan of Reorganization in this court. Objections were received from creditors and a Trustee subsequently appointed. The Debtor subsequently withdrew that Plan, and no amended or revised Plan of Reorganization has been submitted

to the Court by the Debtor or by any other party in interest.

James Scarpone was appointed Chapter 11 Trustee upon a prior Order of this Court. Mr. Scarpone was appointed bythe United States Trustee on or about April 6, 2001. The Trustee has determined to pursue the Adversary Proceeding originally filed by the Debtor seeking again certain injunctive and declaratory relief and damages, that being adversary 01-3031. It also appears that after the Trustee's appointment, on or about May 30, 2001, the Trustee mailed Vision a letter, along with a Trustee check in the amount of $5,548.68 for payment of the April rent.

On June 12th, 2001, Vision filed the present motion for an Order directing the Debtor, now his Chapter 11 Trustee, to surrender the leased nonresidential real property. Thereafter, the Debtor filed a Cross-Motion to convert the case to a Chapter 7 pursuant to Section 1112(b) and argued that under Section 348(c) of the Bankruptcy Code, such conversion could be effectuated in lieu of forfeiture of the Vision lease. Alternatively, the Debtor requested and now requests that this Court dismiss the case and allow Judge Miller in the Superior Court of New Jersey in the context of the pending divorce action to resolve all issues between the parties.

The Debtor's initial argument here attacks the existence of the Master Lease. The Debtor questions whether the relationship between the Debtor and Vision is truly a lessor-lessee relationship. According to the Debtor and

counsel's brief here, the Debtor questions:

> is this "lease" contractually executory, or is it the relationship between parties akin to a debtor-creditor relationship, instead of a lessee-lessor? Is the lease only part of a unified transaction? Is the relationship a financing agreement? Here citing the Torgerson Company case at 114 B.R. 899 ([Bankr. W.] D. Tex. 1990). The Debtor goes on to assert as to what the surrounding circumstances and economic realities surrounding the citing the case of In re Chateaugay, 102 B.R. 335 ([Bankr.] S.D.N.Y. 1989).

The Debtor also suggests that this Court employ its equitable powers and the equity and reorganization policies of executory contract practice in the Bankruptcy Court.

Vision responds that the Debtor's Schedules clearly acknowledge that the installment sale and the Master Lease were two separate transactions. Vision also contends that the installment sale transaction was between Broadway Associates and Vision, while the lease transaction was between the Debtor and Broadway Associates. Thus, Vision concludes that "the only affect the installment sale had on the Master Lease was to make Vision the landlord to the Debtor."

Additionally, Vision argues that the history between the parties clearly recognized a landlord-tenant relationship under the Master Lease. Vision notes that the rent payments were made by the Debtor's own personal checks and emphasizes that the Debtor affirmatively represented that he was the tenant during the course of litigation that occurred in 1999 in the state Landlord/Tenant Court, at which time the Debtor was trying to evict the subtenant, Artistic Academy.

The threshold determination that this Court must make in the context of this motion is to determine whether or not the lease at issue is a true lease. In the case of In Re Wallace, 122 B.R. 222 (Bankr. D.N.J. 1990), this Court examined the issue of whether a lease in that case was a "true lease" or a lease intended for security under New Jersey Statutes 12A:l-201(37) This Court stated:

> There are no absolute standards to distinguish a true lease from a security agreement, however, many courts have set forth factors deemed to be reflective of the parties' intentions. The court is left to balance these factors. If the proprietary interest in the property is weighed in favor of the party designated as lessee, the document is a security agreement. If the balance of incidents of ownership tips toward the party designated as

lessor, the document is a lease.

See that case and the related cases at Page 227 of this Court's Opinion.

In reviewing the record before the Court, this Court finds that the Debtor has failed to demonstrate that the relationship between himself and Vision was anything other than a lessee-lessor relationship. As argued by Vision, this Court is satisfied that the lease transaction and the installment sale transaction are two separate transactions. The "Assumption and Assignment of Leases" admitted by this Court as part of the record "V-1" at the July 17, 2001, hearing clearly indicated that Vision became the landlord under the Master Lease. See the Assumption and Assignment of Leases document attached in the closing binder as Exhibit 7. The actual dealings between the Debtor and Vision also support a finding of a lessee-lessor relationship. Moreover, the cases cited by Debtor, including the Torgerson Company case, cited previously, and the In re Chateaugay Corporation case, are inapposite. The Debtor also argues that the mortgage dated June 27, 1996, between Broadway Associates and Columbia Savings had a "due on sale" clause and that a straight or conventional sale was not anticipated by the parties since the Buyer wished to have wrap-around financing from the present "Seller," and that if Vision actually took title, the financing mechanism would have been void from the outset. Vision counters, however, and the Court notes that in the closing binder by a letter dated July 31, 1997, Columbia Savings expressly consented to the sale of the property. See Exhibit V-1 at Tab 18.

Accordingly, based on this record, the Court finds that the lease, or the Master Lease as it is referred to, is a true lease.

Vision next argues that the Master Lease was automatically deemed rejected due to the Debtor's failure to assume or reject, or move for a timely extension of time to assume or reject, the Master Lease within 60 days of the date of the filing of the petition. See generally the case of In re Grant Foods, 87 B.R. 6 (Bankr. D. Del. 1988); In Re Boston Machines, 87 B.R. 867 (Bankr. E.D. Pa. 1988); and In Re Coastal Industries, 58 B.R. 48 (Bankr. D.N.J. 1986) . Consequently, Vision requests that this Court compel the Debtor, now the Trustee, to surrender the leased premises.

The Debtor counters by arguing that Section 365 (d) (4) does not provide a mandate for such action, citing In re Channel Home Centers, 989 F.2d 682 (3d Cir. 1993); In Re Parkwood Realty, 157 B.R. 687 (Bankr. W.D. Wash. 1993). The Debtor asserts that the Congressional intent and purpose behind the relevant provisions of Section 365 was to prevent a debtor-in-possession, or a trustee, from taking too much time to decide to assume an executory lease. Accordingly, the Debtor argues that the Master Lease should not be deemed automatically rejected because the Debtor argues that he did not delay in deciding the assumption issue; as he asserts, that he was unaware that an issue even existed. Moreover, the Debtor asserts that Vision was not prejudiced because they claim that they did not know the Debtor was in bankruptcy. Nevertheless, the Debtor claims and argues that he did act within the 60 days by filing the aforementioned adversary proceeding

which, among other claims, sought recovery of records.

The Debtor also argues that if the outcome of this motion is not equitable, then the Court may determine that the Executory Contract is not executory. Here citing In re Martin Brothers, 796 F.2d 1435 (11th Cir. 1986), and In re Becknel & Crace Coal Company, 761 F.2d 319 (6th Cir. 1985). The Debtor contends essentially that if forfeiture would be unconscionable, then this Court should exercise its equitable power to invalidate or not enforce the unconscionable contract provisions. Again, see those cases. Debtor also cites in that respect In re Streets & Beard, 882 F.2d 233 (7th Cir. 1989); In re Booth, 19 B.R. 53 (Bankr. D. Utah 1982); Countryman, Executory Contracts in Bankruptcy, 57 Minn L. Rev. 439 (1973); and an article entitled The Use of State Law in Bankruptcy Cases, 47 N.Y.U. L. Rev. 407 (1972). Specifically, the Debtor asserts that "Congress gave the Bankruptcy Court the power to treat a lease as a lien for purposes of the Bankruptcy Code if the lease is in reality a financing transaction." There, citing the Winston Mills case, 6 B.R. 587 (Bankr. S.D.N.Y. 1980). The Debtor also argues that this Court should use its powers under Section 105 of the Bankruptcy Code to reach an equitable result, citing United States v. Energy Resources, 495 U.S. 545 (1990).

Finally, the Debtor argues that - "whether the bankruptcy power as to executory contracts is to be applied would depend on whether the exercise of those options would yield a fair, reasonable, and equitable distribution of the

estate to all parties in interest, including non-debtor parties to the affected contracts, and would not be so unreasonable and arbitrary as to deny due process." Here the Debtor cites the Kuehner v. Irving Trust, 299 U.S. 445 (1937); and Hanover v. Moyses, 186 U.S. 181 (1902). The Debtor contends that this process requires the Court to balance the equities between the benefit to the Debtor's estate and harm to non-parties, citing Midwest Polychem, 61 B.R. 559 (Bankr. N.D. Ill. 1986). The Debtor argues here that forfeiture would be inequitable to the Debtor, his employees, and his creditors, and concludes that "as long as the debtor is paying fair value for the post-petition benefits he receives, he should receive substantial time before he must lose the lease altogether, or commit to assume it." Here citing Theatre Holding v. Mauro, 681 F.2d 102 (2d Cir. 1982); In re Dunes Casino, 63 B.R. 939 (D.N.J. 1986); and In re Wheeling-Pittsburgh Steel, 54 B.R. 772 (Bankr. W.D. Pa. 198S).

Again, as noted here, the Trustee has taken no position as to the Debtor's equitable arguments, although stating in a letter to the Court, as the Court has previously found, that it appears undisputed that the Debtor failed to file an appropriate motion as required by Section 365(d) (4).

Section 365(d) (4) of the Code states:

> Notwithstanding paragraphs (1) and (2) , in a case under any chapter of this title, if the trustee, or debtor-in-possession, does not assume or reject an

> unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

The Third Circuit has acknowledged that this provision "unequivocally provides that a lease must be deemed rejected unless the trustee assumes it before the 60-day period expires or obtains an extension." See In re Channel Home Centers, 989 F.2d 682 (3d Cir. 1993) cert. den. 510 U.S. 865.

Moreover, this Court is not persuaded by the Debtor's equitable arguments. A similar argument was addressed by the Bankruptcy Court for the District of New Jersey at In re Coastal Industries, 58 B.R. 48 (Bankr. D.N.J. 1986). In that case, the Court rejected a request for additional time to reject or assume a lease under Section 365(d) (4) because the request was brought on the 61st day, notwithstanding the fact that a one-day extension was obtained within the 60-day period. Although the specific holding of Coastal Industries is modified by the Third Circuit's decision in In re Channel Home Centers, 989 F.2d at 689, the principles underlying the Coastal Industries decision still apply here. In that case, the Court noted:

> In rendering its decision, the Court looks first to the statute itself, Section 365(d) (4). This Court is mindful of the general principle of statutory construction, to wit, where a statute is plain and unambiguous, it is to be applied, not interpreted. A statute is open to judicial construction only where interpretation is required or an ambiguity is present. The Court would truly be gazing with a jaundiced eye were it to perceive some ambiguity within Section 365 (d) (4). Its language in fixing the time within which the debtor must act is unequivocal. The Court is aware of the harsh result the provision will work in certain instances, as rightly pointed out by the learned commentary, but any attempt to invoke change by judicial legislation here and now would be highly improper.

Moreover, in the Coastal Industries case, the Court specifically rejected an argument brought under Section lOS. The Court stated "any action must take place within the 60-day period specified by statute. Likewise, an exercise of the wide breadth of powers granted in 11 U.S.C. Section 105 would be contrary to the clear goal of the statute and, as such, no undertaking pursuant to Section 105 shall be made." Id.

In the instant case, the Debtor did not file a motion to assume or reject the executory lease, nor did the Debtor request an extension of time to assume or reject the lease, within the 60-day time period provided by Section 365(d) (4) of the Bankruptcy Code. Moreover, the Debtor's filing of the Adversary Proceeding 01-3031 to recover records and for other relief is not equivalent to the type of action contemplated by Section 365(d) (4). However, before determining whether the Master Lease will finally be deemed rejected, the Court must address Debtor's other arguments.

The Debtor argues that the doctrine of implied assumption applies when the applicable party to the contract appears entitled to such relief. Here the Debtor cites In re Waterkist, 775 F.2d 1089 (9th Cir. 1985); In re Illinois-California Express, 72 B.R. 987 (D. Cob. 1987); In re A.H. Robbins, 68 B.R. 705 (Bankr. E.D. Va. 1986); In re Reda, 54 B.R. 871 (Bankr. N.D. Ill. 1985); In re Concrete Pipe Machinery Company, 28 B.R. 837, (Bankr. N.D. Iowa 1983); In re California Steel, 24 B.R. 185 (Bankr. N.D. Ill. 1982); and the case of Shoppers Paradise, 8 B.R. 271 (Bankr. S.D.N.Y. 1980).

In response, Vision argues that even under the Bankruptcy Act, the majority rule was that judicial approval was required before allowing the assumption or rejection of an unexpired lease. Moreover, Vision claims that under the Bankruptcy Code that "Section 365 explicitly requires court approval of a debtor's assumption of an Executory Contract." Vision also in its brief to this Court seeks to distinguish

the cases cited by the Debtor.

Again, the Debtor's arguments do not persuade this Court. The Third Circuit recently affirmed a District Court's conclusion "that formal court approval is required to effect an assumption of an Executory Contract in accord with the terms of Section 365." See In re University Medical Center, 973 F.2d 1065 (3d Cir. 1992). In the case of Schondorf v. Calm, cited at 58 B.R. 1014 (D.N.J. 1986), the District Court for the District of New Jersey previously has explained:

> Second, 11 U.S.C. Section 365 explicitly requires court approval of the trustee's assumption of an Executory Contract. An Executory Contract is "one under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other." The parties here do not and could not dispute that the contract in issue is executory in nature. As a matter of law, Section 365(a) is therefore applicable. Consequently, Section 36S's explicit requirement of court approval of a trustee's adoption of a contract is controlling.

> Case law has made clear that the trustee cannot impliedly assume a contract. "Any uncertainty which may have existed under the [former Bankruptcy] Act concerning the requirement for court approval of assumption or rejection is no longer an issue under 11 U.S.C. Section 365."

Again, see that case at 58 B.R. 1014.

Another issue raised before this Court is that of waiver. Vision argues here that acceptance of post-petition rent payments from the Debtor did not constitute a waiver because, first, Vision was not given any formal notice of the bankruptcy filing, and secondly, Vision argues that to waive a right, one most knowingly relinquish that right. Citing the case of Green v. United States, 355 U.S. 184 (1957). Here, Vision again contends that when it received formal notice, by way of the May 30, 2001, letter from the Trustee, that it did not cash any further rent checks and immediately filed this motion with the Court. The record should note that at the July 17, 2001, hearing, the Court allowed for payment of certain checks of rent to Vision with Vision and all parties reserving all rights as to the issues of waiver up to that point. Vision also cites the case of In re Elephant Bar Restaurant, 195 B.R. 3S3 (Bankr. W.D. Pa. 1996), and In re Car-Gill, 125 B.R. 133 (Bankr. E.D. Pa. 1991), as authority for its argument that mere acceptance of rent after the 60-day period is not sufficient to invoke an enforceable waiver.

This Court finds Vision's argument persuasive. "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right." Here citing the Green versus United States case, 355 U.S. 184 (1957). See also Coventry v. United States Steel, 856 F.2d 5.14 (3d Cir. 1988). "To find waiver. . .three elements must be satisfied: the existence at the time of the waiver of a right, privilege, advantage or benefit; the actual or constructive notice thereof; and the intention to relinquish such right, privilege or benefit." See also the case of In re Sheard 1999 WL 454260 (Bankr. E.D. Pa. 1999).

In the In re Car-Gill case, the Court addressed a waiver argument made by a debtor. In that case, the Court found that a "landlord's mere acceptance of rent after the 60-day period, without more, would not trigger the successful invocation of either waiver or estoppel against it." See that case at Page 139, citing In re Fosko Markets, 74 B.R. 384 (Bankr. S.D.N.Y. 1987). The In re Car-Gill Court noted that "resolution of the issues of waiver and estoppel are fact-intensive, and acceptance of payments, only when in tandem with other facts, is likely to constitute a waiver." Again, see that case at Page 139, citing In re THW Enterprises, 89 B.R. 351 (Bankr. S.D.N.Y. 1988).

In this case, Vision had knowledge of the Debtor's bankruptcy, although asserting that it was not formally noticed until

approximately six months after the filing. After that formal notice, Vision did not cash any rent checks and filed the instant motion. The Debtor has not demonstrated here, as he must, facts indicating Vision's intention to allow the Debtor to assume the lease. Under these circumstances, Vision cannot be said to have made a "voluntary knowing relinquishment of a right," as articulated in the Green v. United States case, 355 U.S. at 191. Accordingly, the Court finds that no waiver or other estoppel has been proven.

The Debtor cross-moves for conversion to a Chapter 7 under Section 1112(b) of the Bankruptcy Code as an alternate contingent remedy to forfeiture. The Debtor argues that mitigating factors also must be applied by the Court in considering whether to convert or dismiss this Chapter 11 case. And lastly, the Debtor asks that the Court consider dismissing this case and sending all issues to the Superior Court of New Jersey. The Debtor contends that dismissal before forfeiture would prevent forfeiture and save what is characterized as a valuable asset of the estate.

The Trustee submitted an Application in support of the Cross-Motion for conversion to a Chapter 7. The Trustee bases his position on the belief that there is no reasonable prospect of a viable Plan of Reorganization to be proposed as contemplated under the Bankruptcy Code, and that therefore cause exists to convert this case to a Chapter 7 under Section 1112 (b). The Trustee states that the Estate has limited resources and that most of the Estate's finances have been utilized to simply maintain the status

quo. The Trustee also asserts that creditors will receive a more favorable disposition if the case is converted to a Chapter 7 rather than dismissed at this time.

Mr. Duva, on behalf of himself and creditor, Fatcar Farms, objects to the Cross-Motion for conversion and asserts that with the Master Lease, the Debtor has sufficient assets to reorganize and that conversion will not benefit creditors. Mr. Duva also supports the Debtor's alternative request for dismissal of the Chapter 11.

Ms. Dionisio also submitted Certifications or pleadings on this issue. Similarly, Ms. Dionisio objects to the Cross-Motion for conversion, but supports the Debtor's alternative request for dismissal of this case.

At the outset, this Court must address Debtor's argument that conversion or other disposition of this case at this time under the provisions of Section 348(c) of the Code could prevent a forfeiture. As noted in a recent article on this subject, "where the statutory time period had expired prior to conversion of the case to a liquidation matter, .. . the 60-day time period for assumption or rejection of contracts and leases by the trustee was not revived through the subsequent conversion." 'See Time Limits on Assumption or Rejection of Executory Contract or Lease under Section 365 at 137 A.L.R. Fed. 137 (1997). See 'also the cases of In re 'Maralak, Ltd., 104 B.R. 446 (Bankr. M.D. Fla. 1989), and In re Tandem Group, 61 B.R. 738 (Bankr. C.D. Cal.

1986) . Accordingly, this Court believes that conversion or other disposition of this case will not prevent a forfeiture. Accordingly, this Court will move forward to the issue of whether or not this case should be converted to a Chapter 7 or dismissed.

As noted, conversion of a case is governed by Section 1112(b) of the Code, which provides, in part, that:

> After notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including
>
> > continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
> >
> > inability to effectuate a plan;
> >
> > unreasonable delay by the debtor that is prejudicial to creditors;
> >
> > failure to propose a plan under Section 1121 of this title, among other cause.

This Court finds that "cause" does exist to convert this present Chapter 11 case to a Chapter 7. As noted by the Trustee, there does not appear to be a reasonable prospect of

reorganization as contemplated by the statute. The Debtor Estate has limited resources, and as noted by the Trustee, those resources have been utilized solely to maintain the status quo. ' Many of the arguments made by both the Debtor, Mr. Duva, and Ms. Dionisio in support of dismissal are based on contingencies. Furthermore, in examining the present posture of this Estate, it appears that the interests of creditors will be better served and protected if this case is converted to a Chapter 7 rather than dismissed. Competing claims of ownership as to asserted Estate assets can and are being adjudicated in this court in conjunction with and respect for the ongoing matrimonial action before Judge Miller.

Finally, Vision in its original motion sought payment of unpaid C.A.M. charges and post-petition rent under the Master Lease under the provisions of Section 365 (d) (3), which requires the Trustee to timely perform obligations under such leases.

At the July 17, 2001, hearing, this Court directed that the June and July rent be paid by the Trustee without prejudice to the respective positions of all parties. At that same time, Vision requested the right to assert a claim for C.A.M. charges. Given the imminent conversion of this case, Vision will be granted leave to file a claim for any unpaid C.A.M. charges and, to the extent outstanding, any unpaid post-petition rent. However, payment of any such claim would await further Order of this Court and review by the Trustee and other parties in interest of any such filed claim.

Based on the findings this Court has made and read into the record today, this Court finds that the Master Lease is an executory lease, that that executory lease under the provisions of the Bankruptcy Code will be deemed rejected. Vision's motion for an Order directing the Debtor (and the Trustee) to surrender the leased nonresidential real property will be granted. Vision's original request for payment of C.A.M. charges and rent from the Trustee will be denied, with the condition that Vision may file a claim in these proceedings for any such remaining outstanding payment. The Debtor's Cross-Motion to convert this case from a Chapter 11 to a Chapter 7 is granted. The Debtor's alternative request to dismiss this Chapter 11 case is denied.

That's my decision. I'll need an Order. I'll ask that, Ms. Gilman, will you be submitting the Order under a motion? I suspect the Trustee will submit an Order on the Conversion Order.

MS. GILMAN: I will, your Honor. As a point of clarification only, when we were here last, the Court directed that the June and July rent be paid.

THE COURT: Yes.

MS. GILMAN: The Trustee has not paid that.

THE COURT: I said that, didn't I?

MS. GILMAN: Yes. The Trustee has not paid it. Can I put in the Order that it be

paid?

THE COURT: Is there a reason why the payment wasn't made?

MR. ROSENBLATT: Not specifically. We were attempting to work out payment with Vision, and then the Trustee has been away. But we intend to do that.

THE COURT: I'm not modifying that Order, so it will be reaffirmed in the Order.

MS. GILMAN: Thank you, your Honor.

MR. NUZZO: Your Honor, respectfully, I would seek a stay of your Order, because obviously I've got to take this up --

THE COURT: Well, let me just indicate this first. I haven't even entered the Order yet. I expect that unless an until an Order is entered, which I'm going to ask be submitted under a 5-day rule, that there would be no ability to enforce that Order. So I believe you have the ability to file a written application for a stay. I'm not going to consider an oral application at this time, because I believe there is sufficient time on shortened time to bring that formally before the Court.

Does any party want to be heard on the oral application, other than to reserve arguments on the motion?

MS. GILMAN: No, your Honor.

THE COURT: Mr. Nuzzo, obviously if you're going to be filing those papers, I assume they'll be filed within the next several days.

MR. NUZZO: Yes, ma'am.

THE COURT: Or contact chambers. I understand, obviously, the time issues, and the matter will be put down on a shortened time frame.

MR. NUZZO: I'll just submit the normal shortened notice paperwork, your Honor.

THE COURT: Yes. And I assume at the same time, the actual Orders will be submitted to the Court.

MS. GILMAN: Yes, your Honor, we'll get you an Order.

THE COURT: Thank you. I don't know whether at this time there are -- is there further scheduling in the adversary proceeding? know there are other parties here that are parties to that proceeding. Are there other dates in connection with the adversary?

MR. DUVA: No, Judge. I think Mr. Rosenblatt is going to begin some depositions this coming week.

MR. ROSENBLATT: We'd like to. We've asked actually for dates from Mr. Fischetti and Ms. Dionisio. The Trustee had scheduled depositions. They have been postponed.

Ms. Dionisio had actually been scheduled and court reporters had been ordered, but she didn't appear. We've asked for dates when we can schedule those depositions. We have not heard back from them in that respect, but I trust we can work that out ourselves and don't need the Court's intervention at this time.

THE COURT: Mr. Fischetti, I received a letter from you which you didn't serve on anyone. When you submit letters to the Court, you're to serve parties.

MR. FISCHETTI: I did.

THE COURT: Did you serve your -- there's no indication that anyone was served.

MR. FISCHETTI: Oh, I'm sorry, yes, I did.

THE COURT: Okay. That's the August 3 letter.

MR. FISCHETTI: Correct.

THE COURT: Then I believe I should parenthetically indicate for the record, you join in the objection to conversion for the record?

MR. FISCHETTI: Yes.

THE COURT: I want to indicate there are parties Pro Se in this case, that when the parties have objections, that they're reflected on the pleadings that I receive.

MR. FISCHETTI: Thank you.

THE COURT: I'm sorry, let me just go back. There was a Case Management Order entered in this adversary proceeding.

MR. DUVA: Judge, there really wasn't. The only thing that was entered really is you gave us a 90-day window because we were having a heck of a lot of trouble agreeing on things. So you gave us a 90-day window, I don't remember the date offhand that you entered that, but to get all of this stuff done.

THE COURT: October 31st.

MR. DUVA: Okay.

THE COURT: Well, that Order has a list of dates, and there are specific dates. Whether those dates have changed, I got other correspondence that seems to indicate that they might have, but there were scheduled depositions that were ordered.

MR. ROSENBLATT: That's correct, your Honor.

THE COURT: Unless I'm looking at a different Order. That's the Order I'm looking at, the August 6th Order. What is the status of those depositions?

MR. ROSENBLATT: Your Honor --

THE COURT: They were to start on August 6th.

MR. ROSENBLATT: As I indicated, we had scheduled Ms. Dionisio's deposition. On the Friday afternoon preceding her deposition, we received a letter with no explanation for why she was not going to attend. I immediately hand-delivered a letter to her indicating that we were planning to go forward with it, we had a court reporter present, there were several attorneys present. Ms. Dionisio failed to show. In response, hoping to avoid having to file a motion for contempt, I had written Ms. Dionisio a follow-up letter requesting dates by. today. I have not heard anything back from her with respect to scheduling a follow-up deposition.

Mr. Fischetti, as well, sent a letter the day before his scheduled deposition indicating he was going to be out of town. Again, I tried to work with Mr. Fischetti, requesting dates. Again, I have not heard back.

The Trustee is trying to be flexible in terms of accommodating people's schedules, but people have come into court indicating to your Honor that they want to move this case along and that they want to be heard. When we've made attempts to do that, everyone has found ways to avoid the Trustee's subpoenas and deposition notices.

MR. FISCHETTI: Excuse me, your Honor. There were depositions scheduled for Mr. Dionisio, as well, which I drove down to and which I was not informed were cancelled, which I felt we should have been informed, because I was told in the letter by Mr. Rosenblatt that we would

be informed two days prior.

THE COURT: That has nothing to do with whether or not parties are properly addressing directions of the Court.

MR. FISCHETTI: I sent a letter a few days ahead of time that I was not going to be available. I sent it to him two days after I received the letter from him that I would not be available. It wasn't a day before. That's misrepresented by Mr. Rosenblatt. If he'd like to take the letters out, he can go ahead and do that.

THE COURT: I don't intend to look at the letters. If there's -- I understand that depositions occasionally can be rescheduled, but it's not sufficient merely to say one is unavailable. Have they been rescheduled and are the parties going to appear? Because if they haven't been rescheduled and the parties aren't going to appear, the parties are going to be in contempt of court, plain and simple.

MR. FISCHETTI: And I'd like to be informed rather than have to drive down, I would like it that if Mr. Rosenblatt would inform us that the depositions had been cancelled.

THE COURT: Mr. Duva, one of your -- your deposition is on this list.

MR. DUVA: Yes, Judge.

THE COURT: Can you advise me what the status of that deposition is?

MR. DUVA: Yes, Judge. I started a trial on that day in Union that Mr. Rosenblatt was kind enough to put that off.

THE COURT: As I said, that's not unusual to reschedule depositions.

MR. DUVA: I'm scheduled for the 21st. I will be there and I will take my deposition.

THE COURT: Well, Ms. Dionisio is ordered to appear at a deposition, Mr. Fischetti, and Mr. Thomas Dionisio. So let's get the dates fixed right now.

Ms. Dionisio, when will you be available for a deposition?

MS. DIONISIO: Well, I don't have a vehicle. I don't have child care. So I would have to be picked up or somebody would have to come to me to depose me. My car was repossessed on the eve of -- on the evening of --

THE COURT: Ms. Dionisio, you arrived in court today. Where are the depositions?

MR. ROSENBLATT: They're scheduled for our office in Newark, which is adjacent to --

THE COURT: Ms. Dionisio, you were able to get to court in Newark and you're not able to get to-the Trustee's offices in Newark?

MS. DIONISIO: I had a ride with my friends today.

THE COURT: Ms. Dionisio, when can you appear at a deposition? If you don't appear at the deposition, you'll be in contempt of this court and subject to sanctions.

MS. DIONISIO: Well, as long as I can get a ride there, I can appear when they want to send me. I sent a letter back, I mailed it, so if they don't have it today, they should get it today. We're here early. I did send a letter back with dates as they requested.

THE COURT: You did give the Trustee dates? Okay. I'm just trying to get a date fixed now so we don't run into additional difficulties. And if you're able to give me a date today or you can give the Trustee a date and the Trustee can either confirm it or not right after this hearing, then we can move forward with this. I don't want to spend too much time on this. I assume the parties can get a date and time.

MR. ROSENBLATT: It shouldn't be. that difficult. I have my calendar. And if Ms. Dionisio actually sent a letter, she should know what dates she had available.

MS. DIONISIO: I don't have a calendar in front of me. I'll make myself available if I can get here. If I have a problem, I'll have to notify the Trustee accordingly and I'll do so.

HE COURT: See, if there's some extraordinary circumstances, Ms. Dionisio, I'm not able to know what those might be. But all I'm suggesting is, as I understand it, the deposition is in Newark. It's not in some other distant or remote location. So I would hope since you had been able to get to court that you may be able to get to the offices, which are just blocks from here.

MS. DIONISIO: Yes.

MR. FISCHETTI: Excuse me, your Honor.

THE COURT: Mr. Fischetti.

MR. FISCHETTI: I was under the impression that the depositions be taken in the county in which you live. Newark is not the county that --

THE COURT: Mr. Fischetti, your deposition is to be taken at the Trustee's offices. I don't know what rule you're referring to. It's not a rule that applies in this court.

MR. FISCHETTI: Okay.

THE COURT: When will you be available -- please stand up when you address me.

MR. FISCHETTI: Yes, I'm sorry.

THE COURT: When will you be available for depositions?

MR. FISCHETTI: The Trustee requested three dates in September, early September.

THE COURT: Will you be available on one of those dates?

MR. FISCHETTI: He didn't give me any dates.

THE COURT: I'm sorry?

MR. FISCHETTI: He didn't give me any dates. He told me to contact him. I had every intention of sending him the dates.

THE COURT: When is Mr. Dionisio -- when is Thomas Dionisio's deposition taking place?

MR. NUZZO: Your Honor, as we speak he's undergoing surgery at New York University Medical Center today, which means he's on the operating table today, but we got a doctor's report. I sent it to -- he suspects the 1st, when was it, October 1st.

MR. ROSENBLATT: Just to be clear, I did get a letter from the Debtor's doctor indicating he would be available on October 1st. That to me seems a little bit long to wait until we get his testimony. I wanted to -- we received that letter I think yesterday or the day before. I am in contact with the Trustee trying to find out what he would like to do in terms of trying to schedule this. We will keep the Court posted on

anything if we can agree on a date.

THE COURT: First of all, the parties that are here, I would suggest I'll give you the opportunity to speak with Mr. Rosenblatt and see if you can work out these new deposition dates, Mr. Duva already has, and the other parties to do the same.

As to Mr. Dionisio's availability or not, I'm not going to rule on it today. If the Trustee is not satisfied that the deposition -- with the facts and circumstances surrounding the taking of that deposition, the Trustee will have to bring a motion. If there's other information that I need to know, I don't have anything in front of me regarding medical information, so I'm not going to make any kind of ruling from the bench.

MR. ROSENBLATT: That's fine.

THE COURT: It's safe to say Mr. Dionisio is subject to having his deposition taken. It appears it's not going to be the 16th, but unless the Trustee is satisfied it can be reasonably rescheduled, obviously I'll allow the Trustee the opportunity to make an appropriate motion to bring that matter before the Court and obviously hear from you, Mr. Nuzzo, on other issues of which I don't have the facts at present.

MR. NUZZO: It's in his interest to have the depositions. It's just that he's had like three or four surgeries in the last month.

THE COURT: You're going to have to provide all of that to the Trustee. The Trustee

will evaluate it and determine whether you can reach some agreement on the scheduling or have to bring that before the Court for a decision.

MR. NUZZO: I understand.

. THE COURT: Is there anything else then? I guess I don't need to do anything else since we do have a Scheduling Order in the adversary and the depositions will go forward. And I believe that there's a status conference in this adversary on October 22nd, parties I believe should have been given that date, October 22nd.

MR. ROSENBLATT: That was included in the Order.

THE COURT: Okay. The Order doesn't here reference the time. I assume it was at 10 o'clock, but I don't have that.

MR. ROSENBLATT: We can be in contact with chambers in advance of that and we'll let all the parties know. It actually does indicate at 11 a.m.

THE COURT: I'm sorry, it's at 11. October 22nd at 11.

MS. GILMAN: If I may.

THE COURT: Are there any other parties on the adversary?

MS. ALBANO: I haven't received anything, your Honor.

THE COURT: Your name again?

MS. ALBANO: Kathleen Albano.

THE COURT: You're a party to the adversary proceeding?

MS. ALBANO: I was to the original one.

THE COURT: Is Ms. Albano still a party in this adversary?

MR. ROSENBLATT: Your Honor --

THE COURT: She should certainly be advised, because I assume she's appearing.

MR. ROSENBLATT: We'll make sure she gets all of the notifications on everything. We had not filed any Superseding Complaint as of yet because we were awaiting your Honor's decision on the conversion.

THE COURT: Is that going to occur within a reasonable period of time so the parties know exactly what they're defending if there is going to be any modification as to the original Complaint?

MR. ROSENBLATT: Yes, absolutely.

THE COURT: And when will that be done so the parties will know if they still remain parties in this matter? I suggest that be done as soon as possible. In fact, prior to these

depositions, if possible.

MR. DUVA: Judge, that's extremely important. I was going to mention that, because I can't even engage in discovery because I have no idea what this new Complaint is going to say.

THE COURT: I agree. When will the new Complaint -- will this be a Superseding Complaint?

MR. ROSENBLATT: It will be a Superseding Complaint.

THE COURT: When is it going to be filed? Because at this point I think before discovery goes forward the parties should be able' to have the benefit of the Complaint.

MR. ROSENBLATT: I would anticipate within thirty days we could have everything finalized and filed.

THE COURT: Mr. Duva, are you asking that your deposition not occur until you have that Complaint in your hand?

MR. DUVA: Judge, I'll go through with my deposition, but I want to be able to engage in some discovery here. I can't send Interrogatories, I can't depose anybody. I have a motion to dismiss this entire Adversary Complaint, but it makes no sense for me to bring it if they're just going to file a new one. My hands are tied at the moment, because without this Complaint being filed -- last time we were here,

Mr. Scarpone said it was.ninety-nine percent complete, and it still has yet to be filed. Now we're going to wait another thirty days.

THE COURT: The Complaint should be filed. And in fairness, it should be filed before the discovery goes forward further.

MR. FISCHETTI: Your Honor.

THE COURT: Yes, Mr. Fischetti.

MR. FISCHETTI: I do request that my depositions be scheduled after this is filed so I know how to defend myself or how to respond.

MR. ROSENBLATT: Well, obviously I'd like to be in touch with the Trustee in terms of getting everything squared away. As your. Honor may know, he's away --

THE COURT: Yes, I know.

MR. ROSENBLATT: -- until the beginning of September. I am in contact with him and I can send him pleadings and things, but I wouldn't want to represent to the Court that I can get everything filed and prepared before his return, which is, as I understand it, September 6th. So I would anticipate that --

THE COURT: Well, that's a thirty-day period, that would envision a thirty-day period. So what I would suggest, I will order today that the Trustee's Complaint, it would be an Amended Complaint, Superseding Complaint, be filed within thirty days of today.

MR. ROSENBLATT: Yes, your Honor.

THE COURT: Served on the parties here and any other parties who may -- you know, are in interest. And I will give some consideration to the scheduling of these depositions once they have the Complaint in hand. So you're going to have to rework the deposition schedule.

MR. ROSENBLATT: Okay. Absolutely, your Honor.

THE COURT: And that can start obviously with Mr. Duva, whose deposition otherwise would be scheduled on the 22nd, but the depositions should start promptly after that date, immediately after that date or immediately after the Complaint is in the parties' hands, and I think certainly counsel can work that out.' And the other parties here pro se, I'd ask obviously that you confer with Mr. Rosenblatt. What we do need are just dates when you are available in September at this point.

MR. FISCHETTI: But it will be after the --

THE COURT: It will be after you're served with the Amended -- or the Superseding Complaint, Mr. Fischetti.

MR. FISCHETTI: Thank you.

MS. GILMAN: I just would like to request the '97 closing binder, the original

closing binder.

THE COURT: Yes, I will return that.

MS. GILMAN: That's what I was standing for.

THE COURT: I didn't mean to do that.

MS. GILMAN: Thank you.

MR. NUZZO: Just for the record, Judge, if that's going to be a part of the public record, I never got a copy of it.

MS. GILMAN: We'll copy it and give it to you.

THE COURT: Okay. Thank you.

(The proceedings are adjourned.)

CERTIFICATE

I, MARY ANN ADAMS, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

s/Mary Ann Adams
Notary Public of the State of New Jersey
Certificate No. X101026

Dated: _____

CLOSED

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THOMAS A. DIONISIO,	:	FILED JUN 27 2002
DEBTOR/APPELLANT, v.	:	CIVIL ACTION
	:	NO: 01-4566(JCL)
TRUSTEE'S OFFICE, et al.,	:	MEMORANDUM
APPELLEES.		AND ORDER
		ENTERED ON THE DOCKET

LIFLAND. District .Judge JUNE 28 2002
WILLIAM T. WALSH, CLERK

Presently before the Court is Thomas A. Dionisio's (the "Debtor's") appeal Bankruptcy Court's September 5, 2001 Orders. For the following reasons, the appeal will be dismissed.

BACKGROUND

The following facts are undisputed, unless noted otherwise. On November 22, 2000, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On January 17, 2001, the Debtor filed a Complaint in the Bankruptcy Court (Adversary Number 01-303 1) against numerous parties, including his estranged wife, Laura Nelson Dionisio. The Complaint sought various relief, including injunctive relief, declaratory relief, and damages. Laura Nelson Dionisio and the Debtor have separated, and divorce proceedings are pending in the Superior Court of New Jersey, Bergen County, Chancery

Division. In one count of the Adversary Complaint, the Debtor sought a turnover of records and documents by Ms. Dionisio. The Debtor alleges that when Ms. Dionisio left the marital dwelling on November 7, 2000, she took with her documents and legal papers.

In its Executory Contracts Schedule, the Debtor did not list any lease with Vision. (Bankruptcy Court August 17, 2001 Opinion ("August 17, 2001 Opinion"), at 11:18-19). In addition, the Debtor did not list Vision as a creditor on the Schedule of Creditors or the Creditor Matrix, nor was the Master Lease listed on the Schedule of Executory Contracts and Unexpired Leases. (Id. at 11:19-23). Accordingly, Vision claims that it did not receive official notice, at the time of filing, that the Debtor had filed for bankruptcy. Vision claims that it did not receive formal notice of the bankruptcy filing until the trustee's payment of rent on or about May 30, 2001. (Id. at 13:4-7). However, the Bankruptcy Court found that Vision did receive actual notice by way of rent checks issued in January 2001, February 2001, and March 2001, which were drawn on a Debtor-in-Possession account. (Id. at 12:1-5).

On March 21, 2001, the Debtor filed a Plan of Reorganization in the Bankruptcy Court. Objections were received from creditors and a Trustee appointed. The Debtor subsequently withdrew that Plan, and no amended or revised Plan of Reorganization was submitted to the Bankruptcy Court by the Debtor or by any other party in interest.

In the Disclosure Statement filed by the Debtor on March 26, 2001, the Debtor stated that the "Debtor is the owner of a Master Lease on 21-2 1 Broadway[,] the owner of the building being Vision Properties ("Vision")." In that Disclosure Statement, the Debtor stated that he owned 70% of Anthony's, Incorporated ("Anthony's"), a New Jersey corporation established by his father in 1939, which was

described as a full-service beauty salon and spa business in Fair Lawn. The Disclosure Statement further stated that the Debtor formerly owned 100% of the stock but sold 30% to his "partner," John Bober, in 1991, who is described as a Vice President at the present time. Paragraph 26 of the Disclosure Statement indicated that, "Said Master Lease, which covers the salon and an adjacent third party pizza business, is a valuable asset of this estate being a 20-year lease with a 20-year option to renew."

On June 12, 2001, Vision moved for an order directing the Debtor to surrender the leased non-residential property to Vision. Thereafter, the Debtor filed a cross-motion to convert his Chapter 11 case to Chapter 7. At a hearing on August 17, 2001, the Bankruptcy Court granted Vision's motion for an Order directing the Debtor and the Trustee to surrender the leased nonresidential real property and granted the Debtor's cross-motion to convert the case from a Chapter 11 to a Chapter 7.

On August 21, 2001, the Debtor filed a motion for a stay pending appeal and for reconsideration and rehearing in which he challenged the Bankruptcy Court's August 17, 2001 decisions. On August 28, 2001, the Bankruptcy Court denied all of the Debtor's motions for reconsideration and rehearing but the Court did grant Debtor a temporary stay pending the Debtor's filing of a motion in the District Court pursuant to Fed. R. Bankr. Proc. 8005. The Orders reflecting the Bankruptcy Court's August 28 decisions were entered on the docket on September 5, 2001.

On September 28, 2001, the Debtor filed a motion in this Court seeking a stay pending appeal of the Bankruptcy Court's Order directing the Debtor and the Trustee to surrender the leased nonresidential real property to Vision, of the Order authorizing the conversion of the case from Chapter 11 to Chapter 7, and of the Order denying the

Debtor's motion for a stay pending appeal. On December 10, 2001, this Court issued a Memorandum & Order denying the Debtor's motion for a stay pending appeal.

On October 19, 2001, the Debtor appealed the Bankruptcy Court's September 5, 2001 Orders reflecting the Bankruptcy Court's August 28, 2001 decisions. In his appeal, he argues that (1) § 365 of the Bankruptcy Code does not mandate the deemed rejection of a nonresidential real property lease; (2) the 60-day period in which the Debtor was required to elect to assume or reject a nonresidential real property lease or request an extension of time for cause recommenced upon the conversion of the case from Chapter 11 to Chapter 7; and (3) the Debtor did not even know he had a lease to assume and that it is questionable as to whether the Master Lease is even a lease or some other type of financing arrangement.

STANDARD OF REVIEW

The proper standard of review to be applied by a district court when reviewing a ruling of a bankruptcy court is determined by the nature of the issues presented on appeal. Legal conclusions of a bankruptcy court are subject to de novo or plenary review by the district court. In re O'Brien Environmental Energy, Inc., 188 F.3d 116, 122 (3d Cir. 1999); see also Donaldson v. Bernstein, 104 F.3d 547, 551 (3d Cir. 1997); Chemetron Corp. v. Jones, 72 F.3d 341, 345 (3d Cir. 1995), cert. denied, 116 S. Ct. 1424 (1996). The factual determinations of the bankruptcy court are not to be set aside unless "clearly erroneous." Fed. R. Bankr. P. 8013; see also Chemetron Corp., 72 F.3d at 345; In re Indian Palms Associates, Ltd., 61 F.3d 197, 203 (3d Cir. 1995). On review of the factual findings of a bankruptcy court, a district court must "give due regard to the opportunity of that court to judge first-hand the credibility of the witnesses." Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc., 57

F.3d 1215, 1223 (3d Cir. 1995) (quotations omitted). Where a matter presents mixed questions of law and fact, it is appropriate to apply the relevant standard to each component of the issue. Chemetron, 72 F.3d at 345.

DISCUSSION

I. Bankruptcy Rule 8010

Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 8010 is designed to ensure that the district court is fully advised with respect to the contentions of the party on appeal from the bankruptcy court. In re TWA, Inc., 145 F.3d 124, 132 (3d Cir. 1998). Pursuant to Bankruptcy Rule 8010, all appellate briefs filed in the district court are required to contain a statement of the issues presented, a statement of the basis of appellate jurisdiction, the applicable standard of appellate review, a statement of the case, a table of contents, a table of cases and other authorities cited, and an argument section. Fed. R. Bankr. P. 8010. A district court may deem an argument waived if it is not presented in accordance with Bankruptcy Rule 8010. In re TWA, 145 F.3d at 132.

Vision argues that the Debtor failed to comply with any of the requirements of Bankruptcy Rule 8010 and that the argument section of the Debtor's brief merely makes conclusory statements without providing legal or other authoritative support for his contentions. Vision therefore argues that this Court should find that the Debtor has abandoned and waived all of the issues raised on appeal. Vision also argues that if this Court does not make such a finding, then the Court should only consider the issues which the Debtor discussed in his brief.

The Debtor has not responded to these arguments.

Although the Debtor failed to comply with some

aspects of Bankruptcy Rule 8010, the argument section of his brief contains more than merely conclusory statements and does provide legal support for his arguments. In the argument section of his brief, the Debtor presents three major legal arguments and offers legal support for each of them. Therefore, the Court will not deem the Debtor's legal arguments waived and will consider all of the arguments raised in the Debtor's briefs.

II. Law of the Case Doctrine

Vision argues that the law of the case doctrine warrants the dismissal of this appeal since the issues have already been resolved in this Court's December 10, 2001 Memorandum and Order.

The law of the case doctrine was developed to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." Casey v. Planned Parenthood, 14 F.3d 848, 856 (3d Cir. 1994) (quoting Charles A. Wright et al., 18 Federal Rules and Practice § 4478 (1981)). The doctrine dictates that "when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation." In re Resyn Corporation, 945 F.2d 1279, 1281 (3d Cir. 1991) (quoting Devex Corp. et al. v. General Motors Corp., 857 F.2d 197, 199 (3d Cir. 1988).

But law of the case is not established by denial of a stay. Charles A. Wright et al., 18B Federal Practice and Procedure § 4478.5 (2002); Lambert v. Blackwell, 134 F.3d 506, 512-13 n.17 (3d Cir. 1998). In Lambert, a panel of the Third Circuit, in ruling on a motion for a stay pending appeal, had concluded that respondents had not shown that they were likely to succeed on the argument that petitioner had failed to exhaust her state court remedies. Lambert, 134 F.3d at 512-13 n.17. The Court found that "that inherently tentative

conclusion, based on a record less complete than that before us and not reached after the opportunity for the intensive study available to a merits panel, is not binding on this panel." Id.

In this case, this Court denied a motion for a stay pending appeal. In denying the motion, this Court opined that the Debtor was not likely to succeed on the merits of his appeal. Under Lambert, the law of the case doctrine does not preclude this Court from addressing the merits of the Debtor's arguments on appeal.

III. Legal Arguments

A. Assumption or Rejection of Lease

Bankruptcy Code §365(d)(4) provides that if a trustee or debtor-in-possession:

> does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee, or debtor-in-possession, shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. §365(d)(4). In re Rickel Home Centers, 1997 WL 538785, at *1 (D. Del. Aug. 13, 1997). The 60-day period begins on the date of the bankruptcy filing. In re Boston Business Machines, 87 B.R. 867, 872 (Bankr. E.D. Pa. 1988); In re Grant Food Products, Inc., 87 B.R. 6, 8 (Bankr. D. Del. 1988). The statute "unequivocally provides that a lease must be deemed rejected unless the trustee assumes it before the 60-day period expires or obtains an extension." In re

Channel Home Centers, Inc., 989 F.2d 682, 686 (3d Cir. 1993); see also In re Coastal Industries, Inc., 58 B.R. 48, 50 (Bankr. D.N.J. 1986). Although harsh results will occur with some applications of the statute, any attempt to change the statute through "judicial legislation . . would be highly improper." Coastal Industries, 58 B.R. at 50.

The Debtor argues that the 60-day period of §365(d)(4) is not immutable and that the rule should not be applied in this rare case in which the rule creates a draconian result. In support of this proposition, the Debtor points to language from Channel that "even unambiguous statutory language need not be followed in those 'rare cases' [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." Channel, 989 F.2d at 687. The Debtor also points out that this case is distinguishable from Channel and Coastal Industries because in those cases the properties subject to commercial leases were vacant.

In Channel, the debtors, more than 60 days after the order of relief, sought and were granted a second extension of the period of time within which they had to decide whether to assume or reject their leases. Id. at 684. The Court held that § 365(d)(4) permits a bankruptcy court to grant a second extension more than 60 days after the order of relief. Id. at 689. The Debtor's reliance on Channel is misplaced because, unlike in Channel, the Debtor in this case never sought even one extension of the 60-day period.

Coastal Industries is also unavailing because the Court in that case denied a motion for an extension of time to assume or reject a lease because it was not heard in the 60-day period. Coastal Industries, 58 B.R. at 51.

In addition, although the property in this case was not vacant, the Debtor has not cited any cases indicating an

exception to § 365(d)(4) for non-vacant properties. The statutory language is unambiguous in requiring that a lease must be deemed rejected unless the debtor-in-possession assumes it before the 60-day period expires or obtains an extension. Channel, 989 F.2d at 686. The statute controls and the Debtor's argument fails.

The Debtor also argues that he is unaware of any cases on this issue in which a debtor or trustee was not aware of the asset or its existence. Presumably, the Debtor argues that he was not aware of the Master Lease, the asset in this case, or its existence because he did not have access to relevant documents allegedly taken from his home by his wife. But the record indicates that the Debtor was well aware of the existence of the Master Lease because in his March 26, 2001 Disclosure Statement, he stated that he owned the Master Lease and described it as a "valuable asset" of the estate. Moreover, he admitted to the Bankruptcy Court that he paid rent on the Master Lease with personal checks. (August 17, 2001 Opinion, at 15:11-12). Thus, the Debtor's argument is unavailing.

The Debtor also argues that the Bankruptcy Court failed to exercise its inherent equity power to avoid a harsh result and that the Bankruptcy Court should have adhered to legal precedents to avoid forfeiture, which the law has always abhorred. He refers to numerous cases, all of which are inapposite.

The Debtor cites In re Boston Business Machines, 87 B.R. 867 (Bankr. E.D. Pa. 1988) in which the Court denied the debtor's motion to assume its lease because the debtor did not move to assume the lease until well after the expiration of the 60-day period. Id. at 872-73. In this case, the Debtor also failed to move to assume the lease before the expiration of the 60-day period. Therefore, Boston Business Machines is unavailing.

The Debtor next cites In re Frontier Properties, Inc., 979 F.2d 1358(9th Cir. 1992) for the proposition that there is no unequivocal statutory mandate. In that case, the bankruptcy court approved the stipulation entered into by both the trustee and the creditor authorizing the contract's assumption. Id. at 1365. The Court held that the trustee validly assumed the contract within the 60 day period. Id. at 1366. That case is clearly distinguishable from the facts of this case because the Debtor in this case made no attempt to assume the lease within the 60-day period.

The Debtor also cites cases permitting a debtor-tenant to assume a lease because of the landlord's affirmative response to a debtor's actions consistent with assumption. See In re Pier 5 Management Co., Inc., 83 B.R. 392 (Bankr. E.D. Va. 1988) (holding that a landlord is estopped from contesting a belated motion to assume a commercial lease by its refusal to supply information necessary to calculate rent); In re Ranch House of Orange-Brevard, Inc., 78 B.R. 323 (Bankr. M.D. Fl. 1987) (holding that landlords waived their right to contest debtor's belated assumption of lease by accepting rent after they knew of reorganization proceedings and of debtor's rejection of lease in its plan of reorganization). In Pier 5, the landlord's actions induced the debtor to forsake requesting an extension of time during the 60-day period. Pier 5, 83 B.R. at 394. Unlike in Pier 5, Vision never induced the Debtor not to request an extension or to assume the lease during the 60-day period.

In Ranch House, the Court held that the landlords waived their right to treat the lease agreement between the parties as rejected where the landlord continued to accept rent and treat the lease as valid after it had knowledge of reorganization proceedings initiated by the debtor and after the debtor rejected the lease in its plan of reorganization. Ranch House, 78 B.R. at 327. In this case, Vision had knowledge of the Debtor's bankruptcy following the filing,

but unlike the landlords in Ranch House, Vision did not continue to treat the lease as valid once it received formal notice that the Debtor had filed for bankruptcy. After receiving formal notice, unlike in Ranch House, Vision did not cash any rent checks and filed a motion in the bankruptcy court for the surrender of the property at issue. (August 17, 2001 Opinion, at 32:8-10). Therefore, Ranch House is also unavailing.

The Debtor also argues that waiver or estoppel applies in this case because Vision continued to accept rental payments after it received notice that the Debtor had filed for bankruptcy. In support of his argument, he cites In re T.F.P. Resources, Inc., 56 B.R. 112 (Bankr. S.D.N.Y. 1985) and In re TRW Enterprises, Inc., 89 B.R. 351 (Bankr. S.D.N.Y. 1988).

Waiver "connotes some kind of voluntary knowing relinquishment of a right." Green v. U.S., 355 U.S. 184 (1957). Waiver will be found if three elements are satisfied: (1) "the existence at the time of the waiver of a right, privilege, advantage or benefit; (2) the actual or constructive notice thereof; and (3) the intention to relinquish such right, privilege or benefit." In re Sheard, 1999 WL 454260, at *4 (Bankr. E.D. Pa. 1999). In addressing a waiver argument made by a debtor, the Court in In re Car-Gill, Inc., 125 B.R. 133 (Bankr. E.D. Pa. 1991) found that a landlord's "mere acceptance of rent after the 60-day period, without more, would not trigger the successful invocation of either waiver or estoppel against it." Id. at 139. The Court noted that "resolution of the issues of waiver and estoppel are fact-intensive, and acceptance of payments, only when in tandem with other facts, is likely to constitute a waiver." Id.

In this case, Vision had knowledge of the Debtor's bankruptcy but asserted that it did not have formal notice until approximately six months after the filing. After

receiving formal notice, Vision did not cash any rent checks and moved in Bankruptcy Court for an order directing the Debtor to surrender the property at issue to Vision. In addition, the Debtor failed to file an appropriate motion within the 60-day period following his bankruptcy filing, either to assume the lease or for an extension of time to assume the lease, as required by § 365(d)(4). Although Vision accepted rent after the 60-day period, there are no additional facts to support the Debtor's argument of waiver or estoppel. Therefore, his argument fails.

In addition, the cases cited by the Debtor do not support his waiver argument and are distinguishable on their facts. In T.F.P. Resources, the lessor continued to accept rent after receiving formal notice of the debtor's filing for bankruptcy. Id. at 116. The Court therefore held that the lessor continued to treat the lease as in effect regardless of the deemed rejection provided by § 365(d)(4). Id. This case is factually distinguishable from T.F.P. Resources because in this case, Vision ceased accepting rent after receiving formal notice of the Debtor's bankruptcy filing.

In THW, the lessor had actual knowledge that the debtor had filed for bankruptcy but accepted rent payments from the debtor for 14 months after the filing. Id. at 356. In addition, the lessor failed to tell the debtor that it considered the lease terminated, notwithstanding the debtor's requests for a determination whether an extension or buyout would occur. Id. at 356-57. The Court held that the lessor waived the forfeiture provisions of § 365(d)(4). Id. at 357. This case is distinguishable because upon receiving formal notice of the Debtor's filing for bankruptcy, Vision did not cash any rent checks. Furthermore, the Debtor in this case never made requests for a determination whether an extension or buyout would occur. The Court in THW noted that there are "cases where the acceptance of payments due under the lease could, in tandem with other facts, constitute a waiver." Id. at 356

(citation omitted). These "other facts", while present in THW, are absent in the case at hand.

Finally, the Debtor makes this argument (in the section of his brief dealing with assumption of the lease pursuant to § 365(d)(4):

> There was no development of the facts in the Dionisio case, no discovery, no analysis of the 3 ½ inch fat book of documents handled (sic) by Appellee's Counsel across counsel table at a hearing on the matter, and a determination made thereon by the Bankruptcy Judge sua sponte, and without opportunity for Debtor Counsel to read, understand or develop the document's essence, history and meaning. (Debtor's Reply Brief, at 10).

The Debtor further argues that he has been denied due process of law.

The Debtor points to nothing in the record supporting his argument, and this Court has reviewed the record and found nothing to support his argument. Furthermore, neither the Debtor nor his counsel have presented an affidavit or certification attesting to these facts.

Accordingly, the Debtor's arguments as to Bankruptcy Code §365(d)(4) fail.

B. Recommencement Upon Conversion

The Debtor also argues that conversion of the case to Chapter 7 would effect a recominencement of the 60-day period pursuant to Bankruptcy Code §348(c). In support of his argument, he cites In re Joyner, 74 B.R. 618 (Bankr. M.D. Ga. 1987) and In re Lavigne, 114 F.3d 379 (2d Cir. 1997).

When a case is converted from Chapter 11 to Chapter 7, the 60-day period will run from the date of conversion. 3 Collier on Bankruptcy ¶ 365.04[1][a]. Nevertheless, the conversion of a case from Chapter 11 to Chapter 7 "does not erase the prior proceedings." In re Maralak, Ltd., 104 B.R. 446, 449 (Bankr. M.D. Fl. 1989). Nonresidential leases rejected during a Chapter 11 case are not revived by the conversion order, triggering a new opportunity for the trustee or debtor-in-possession to reject or assume the lease. Rosemary Williams, Annotation, Time Limits on Assumption or Rejection of Executory Contract or Lease Under §365 of Bankruptcy Code (11 U.S.C.A. §365), 137 A.L.R. Fed. 137 (1997); Maralak, 104 B.R. at 449. The Debtor's citations to Joyner and Lavigne are unavailing because neither involved the situation in this case, in which the 60-day period expired before the case was converted to Chapter 7. Therefore, Debtor's argument regarding recommencement of the statutory period fails.

The Debtor also argues that Vision waived its right to request forfeiture of the property at issue by accepting rent payments after learning of the Debtor's bankruptcy filing, and therefore that the 60-day period did not expire before the case was converted to Chapter 7. If the Debtor's waiver argument had merit, then this argument might be available. But his argument fails because this Court has already rejected the Debtor's waiver argument.

C. Lease or Other Arrangement

The Debtor also argues that he did not even know he had a lease to assume and that it is questionable as to whether or not the Master Lease is even a lease or some other type of financing arrangement. He further argues that this issue was never fully explored below because it was never the subject of any discovery or a hearing. He further argues that it is unclear whether the lease and installment sale were separate

and distinct transactions.

The evidence of record clearly supports the Bankruptcy Court's finding that the Debtor knew he had a lease. In the Disclosure Statement filed by the Debtor on March 26, 2001, almost three months before the motion filed by Vision to deem the lease rejected, the Debtor stated that the "Debtor is the owner of a Master Lease on 21-21 Broadway[,] the owner of the building being Vision Properties ("Vision")." Paragraph 26 of the Disclosure Statement indicated that, "Said Master Lease, which covers the salon and an adjacent third party pizza business, is a valuable asset of this estate being a 20-year lease with a 20-year option to renew." Moreover, the Debtor admits paying rent on the Master Lease with his own personal checks. (August 17, 2001 Opinion, at 15:11-12).

In addition, the Bankruptcy Court held that the Master Lease was, in fact, a true lease and refers to substantial factual support for this conclusion. (August 17, 2001 Opinion, at 21:5-7). The Bankruptcy Court carefully considered the Debtor's arguments as to whether the Master Lease was a true lease. The Debtor fails to cite any cases and fails to point to any facts in the record supporting his argument, nor has he pointed to anything in the record supporting his argument that this issue was never the subject of any discovery. Therefore, this Court agrees with the Bankruptcy's Court's holding.

The Debtor also alleges that his interest in the lease is claimed by his wife in both these proceedings and in the divorce proceeding which she filed contemporaneously with the foreclosure sale and bankruptcy proceedings. He argues that because the issue of who owns the lease is joined in both proceedings, and not yet determined, he cannot understand how the Bankruptcy Court could allow forfeiture of the asset rendering a third party's claim forfeit without proper party

joinder, discovery, hearing, and determination.

In the Disclosure Statement filed by the Debtor on March 26, 2001, the Debtor stated that he was the owner of a Master Lease on the property at issue. The Debtor's argument that his wife may be the owner is inconsistent with the sworn statements made in his Disclosure Statement and is therefore rejected. In addition, presumably the Debtor's wife should have intervened in this matter but has not done so. Finally, the Debtor's argument is immaterial because even if the Bankruptcy Court erred, its error would have no effect on the Debtor.

Accordingly, **IT IS** on this 27th. day of June, 2002 **ORDERED** that the Debtor's appeal from the Bankruptcy Court's September 5, 2001 Orders is dismissed.

s/John C. Lifland
John C. Lifland
United States District Judge